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IN THE

Supreme Court of the United States

GLORIA KRONISCH, Executrix of the Estate of Stanley Milton Glickman,

Petitioner,

against

UNITED STATES OF AMERICA, SIDNEY GOTTLIEB, in his individual and in his official capacities, RICHARD HELMS, in his individual and in his official capacities, and JOHN DOE, unknown agents of the Central Intelligence Agency,

Respondents.

GLORIA KRONISCH, Executrix of the Estate of Stanley Milton Glickman,

Petitioner,

against

MARGARET GOTTLIEB, Executrix of the Estate of Sidney Gottlieb,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. On a motion for summary judgment, whether the lower courts erred in deciding as a matter of law, contrary to this Court's cases, the disputed fact issue as to when the CIA's fraudulent concealment ended for purposes of tolling the statute of limitations?

2(a). Whether the lower courts violated Supreme Court precedent by holding the CIA's sources and methods privilege was "absolute" instead of "balancing" the parties' needs?

2(b). Whether the Federal Rules of Evidence were violated when the CIA vitiated the document sample submitted for *in camera* privilege review by secretly substituting one unredacted document for another?

3(a). Should this Court clarify its own decisions relating to the abuse of discretion standard for evidentiary rulings by incorporating this Court's definition of abuse of discretion in another case?

3(b). Did the lower courts properly interpret the requirement of "authenticity" under the Federal Rules of Evidence?

4. Whether the lower courts erred in qualifying respondent's psychiatric witness to render an expert opinion under this Court's authorities where he conceded, *inter alia,* that LSD "was really out of his ken, "not really" part of his specialty and his peers did not even recognize him as an expert on psychedelic drugs?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Gloria Kronisch, Executrix of the Estate of Stanley Milton Glickman, respectfully petitions for a Writ of Certiorari to review the judgments of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion on Respondents' Rule 56 motion for summary judgment and the privilege issue (15a) is reported at *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998). The district court opinion relating to the summary judgment motion (66a-72a) is reported at *Kronisch v. United States*, 1997 WL 907994 (S.D.N.Y. 1997). The district court adopted the Magistrate Judge's Report and Recommendation (72a-129a). The district court's opinion on statutory and state secrets privilege (130a-134a) is unreported. The district court adopted the Magistrate Judge's Report and Recommendation (134a-165a).

The Second Circuit summary order (before a different panel) on the merits against the Estate of Sidney Gottlieb (1a-10a) is reported at *Kronisch v. Gottlieb*, 2000 WL 534301 (2d Cir.). The district court judgment on the jury verdict in favor of

respondent after trial (13a-14a) in *Kronisch v. Gottlieb* was entered on May 12, 1999 (unreported).

STATEMENT OF JURISDICTION

The jurisdiction of this Court in invoked under 28 U.S.C. §1254(1).

The judgment of the Second Circuit Court of Appeals was entered on May 2, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and declining a petition for rehearing en banc on August 14, 2000 (11a-12a).

On July 9, 1998, the Second Circuit affirmed in part the dismissal of the FTCA claims against the United States and the *Bivens* claims against Richard D. Helms, former Director of the Central Intelligence Agency ("CIA") and Sidney Gottlieb, former head of the Chemical Division of the Technical Services Division of the CIA, for administering a program of surreptitious LSD testing on unwitting subjects, that included Glickman among its victims, under the statute of limitations, and vacated in part and remanded to the district court for a jury trial of the *Bivens* claim that Gottlieb himself administered the LSD-laced drink to plaintiff in Paris in October 1952.[1] Because the Court of Appeals remanded this case, it was not ripe for review by this

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[1] This petition in points I and II of the Reasons for Granting Certiorari covers the July 9, 1998 order relating to summary judgment and the privilege issue (reference is to **respondents** in top caption on cover).

Court. *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967).

After trial, the Court of Appeals affirmed the jury verdict for respondent in May 2000.[2] Thus, this litigation is now ripe for review by this Court inasmuch as there is a final judgment. "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993).[3]

RULES INVOLVED

The Federal Rules of Evidence provide:

Rule 803 provides the following exception to the hearsay rule:

Rule 803(16) Statements in Ancient Documents.
Statements in a document in existence twenty years or more the authenticity of which is established.

Rule 901(b)(8) Ancient Documents or Data Compilation.
Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a

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2 This petition in point III covers the May 2, 2000 judgment relating to the trial (reference is to **respondent** in bottom caption on cover).

3 There are circumstances where this Court will exercise its certiorari jurisdiction prior to the entry of a final judgment in the lower courts. *See Mazurek v. Armstrong*, 520 U.S. 968, 975-976 (1997). But this is not such a case.

place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Rule 803(7) Absence of Entry in Records Kept in Accordance with the Provisions of paragraph (6)

Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to **prove the nonoccurrence** or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.[4]

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness **qualified as an expert** by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT

Petitioner[5] brought this civil case under the Federal Tort Claims Act against the United States of

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[4] Emphasis supplied throughout unless otherwise noted.

[5] Stanley Milton Glickman was the plaintiff who commenced this action. He died in December 1992. Mr. Glickman's sister, Gloria Kronisch as Executrix of the Estate of Stanley Milton Glickman, was substituted as plaintiff in 1993.

America and under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), claims against two officials of the CIA, Sidney Gottlieb and Richard Helms, claiming that "he was one of the victims of the CIA's program to test the effects of mind altering drugs, including lysergic acid diethylamide ("LSD"), on unwitting subjects beginning in the early 1950s. Glickman claims that Gottlieb or some other agent of the United States government placed LSD in his drink in a Paris café in October 1952" (16a). At that time Glickman was a promising American artist, age 25, who was studying in Paris, France. One of his paintings had been accepted for a prestigious competition by the Metropolitan Museum of Art in New York City. After the drugging, Mr. Glickman was hospitalized for approximately 9 days in the American Hospital in Paris. The unwitting drugging caused Mr. Glickman to have an adverse LSD reaction, including terror and hallucinations. As a result, he never painted again.

For 25 years, Mr. Glickman had no insight as to what had happened to him. In 1977, his sister, Gloria Kronisch called Mr. Glickman and told him about an "article indicating that the CIA had experimented with LSD on unsuspecting persons in foreign countries in the 1950's" (27a). During the period October 1977 through February 1978, Glickman sent three letters to the CIA, had three telephone conversations with the CIA, received three letters from the CIA, sent two letters to Senator Kennedy and received one letter from him, sent a letter to the Attorney General and received a letter from his administrative counsel (169a-183a). In his

letters during this period, Glickman expressed his belief that he was one of the CIA's unsuspecting victims (27a). In its February 10, 1978 letter, the CIA advised Glickman that "it had completed the search of its files and had uncovered no record of him." (36a).

Mr. Glickman filed an administrative tort claim with the CIA on December 22, 1981, which claim the CIA denied by letter dated December 1, 1982. Thereafter, Mr. Glickman filed a complaint on March 20, 1983. In 1985, Judge Griesa denied several motions made by defendants under Fed.R.Civ.P. 12(b) and 56. *Glickman v. United States*, 626 F. Supp. 171, 175-6 (S.D.N.Y. 1985).

In late 1993, plaintiff's request for access to unredacted forty-five year old documents, in which defendants raised statutory and state secret privilege issues, was denied by Memorandum and Order dated September 27, 1994, of the Magistrate Judge (134a-165a) and affirmed by the district court on May 18, 1995 (130a-134a). In April 1996, defendants filed a motion for summary judgment based on statute of limitations, the merits and personal jurisdiction defenses which motion was granted on August 30, 1996 by the Magistrate Judge dismissing all claims against all parties (72a-129a). The District Court adopted that Report and Recommendation on April 14, 1997 (66a-72a).

By decision dated July 9, 1998, the Second Circuit affirmed in part and vacated in part the judgment of the district court. *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998) (15a-65a). The Second Circuit vacated the dismissal for

untimeliness, on the merits and personal jurisdiction of Glickman's *Bivens* claim against Gottlieb, and remanded those issues to the district court for a jury trial, insofar as Glickman alleged that Gottlieb himself was the person who gave Mr. Glickman the LSD-laced drink. As to Glickman's FTCA claims against the United States and his *Bivens* claims against Gottlieb and Helms, insofar as these claims allege that they administered the program, the Court affirmed the dismissal as untimely under the respective statute of limitations.

The Court of Appeals reversed the District Court's grant of defendants' motion for summary judgment on the merits. The Court of Appeals held *(54a)* that "at the summary judgment stage, we are required to draw all factual inferences in Glickman's favor" and also held *(54a-55a):* "for purposes of this summary judgment motion (only), **defendants** do not contest that Glickman was unwittingly drugged with LSD in a Paris café in 1952 [and] ... [d]efendants' likewise do not contest at this stage that Glickman was given the LSD–laced drink by an American with a clubfoot -- a distinguishing characteristic possessed by Gottlieb, the head of the MKULTRA program." It also held that the possibility that the jury would draw an adverse inference against Gottlieb for the intentional destruction of documents "along with plaintiff's other circumstantial evidence that he was drugged by the **CIA** – specifically, by Gottlieb – is enough to entitle plaintiff to a jury trial." *(59a).* Thus, the Second Circuit effectively vacated the dismissal of the summary judgment on the merits against Gottlieb and the other defendants, including

the FTCA claim against the United States. However, inasmuch as the Second Circuit affirmed summary judgment based on statute of limitations against the United States, Gottlieb and Helms in their official capacities and against Helms in his individual capacity, if petitioner prevails in this Court on the issue of statute of limitations against the United States on his FTCA claim and his *Bivens* claim against Gottlieb and Helms in their individual capacities, then his claim on the merits against them should be remanded for trial.

On remand, discovery matters were heard by the Magistrate Judge and objections to the Magistrate's rulings were appealed to District Court Judge Kimba Wood. Judge Wood transferred the case to Judge Dominick DiCarlo for trial.

On March 8, 1999, defendant Dr. Sidney Gottlieb died. His wife, Margaret Gottlieb, as executrix of his estate, was substituted as defendant.

On April 8, 1999, trial commenced and the jury returned a verdict on the merits for respondent on April 30, 1999. Judge DiCarlo died prior to summation and the case was returned to Judge Wood. Judgment was entered on May 12, 1999, dismissing the complaint (13a – 14a).

REASONS FOR GRANTING THE WRIT THE DECISIONS OF THE COURT OF APPEALS CONFLICT WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF THE SECOND CIRCUIT AND OTHER REGIONAL CIRCUITS

I. THE COURT OF APPEALS ERRED IN DECIDING AS A MATTER OF LAW THE ISSUE OF TOLLING THE STATUTE OF LIMITATIONS ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The question here is whether "tolling" of the statute of limitations was a genuine issue for trial or whether it could be decided as a matter of law where all reasonable inferences must be drawn in favor of the non-movant petitioner. The courts below erred in deciding it as a matter of law.

Inasmuch as the Second Circuit vacated the summary judgment on the merits and held that the adverse inference from the intentional destruction of documents "along with plaintiff's other circumstantial evidence that he was drugged by the CIA – specifically by Gottlieb – is enough to entitle plaintiff to a jury trial" (59a), then it follows that a trial is required to determine whether the CIA knew that it drugged Glickman when it advised him that it uncovered no record of him. Therefore, the triable issue is when did "tolling" end?

Once a jury could reasonably conclude for purposes of summary judgment that **the CIA and Gottlieb drugged Glickman with an LSD laced drink** in a Paris café in 1952, then logically the CIA knew that Glickman was one of its unwitting LSD victims. It follows that the CIA's three letters responding to Glickman by stating that his name was not in its files, when in fact it knew that he was one of its victims, were clearly false and designed to mislead and deceive him. On that analysis, the CIA's three letters represented a fraudulent concealment of a material fact -- that Glickman was an innocent victim of an LSD drugging by the CIA.

But the Second Circuit's focus and holding about the CIA's response was a major error of law. It held:

> The CIA merely informed Glickman, in a letter dated February 10, 1978, that it had completed the search of its files and had uncovered no record of him. **Even assuming arguendo the merits of Glickman's claim**, there is no reason to believe that this response was **inaccurate** in light of the destruction of MKULTRA documents in January 1973... Glickman was already aware, from Senator Kennedy's letter [ ] that the MKULTRA files had been destroyed in 1973. Therefore, the fact that the CIA uncovered no documents containing Glickman's name..., can [not] be characterized as an obstructive 'concealment' warranting the tolling of the statute of limitations. (36a).

Accordingly, the holding that "there is **no reason** to believe that this response was **inaccurate**" is a monumental error. Once a jury could reasonably find that Glickman was an unwitting LSD victim of the CIA, then it necessarily follows that the **CIA knew it**. The truth is that the Second Circuit simply failed to apply its own assumption "assuming arguendo the merits of Glickman's claim," which logically requires the same assumption that the CIA knew Glickman was a victim at that time and that the CIA deceived Glickman. It also follows that tolling the statute of limitations could not be held, as a matter of law, to have terminated at that very time.

The fact is that the Second Circuit erroneously decided as a matter of law a disputed issue of fact – namely, whether there was a fraudulent concealment of the material fact that the CIA drugged Glickman with LSD. In so doing, the Court of Appeals violated this Court's holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986) that "[s]ummary judgment is appropriate only if, construing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact remains to be resolved by a jury. ... We do not resolve disputed issues of fact but determine whether genuine issues of fact exist to be resolved at trial."

Therefore, the Second Circuit erred in holding as a matter of law that during this very same period – "no later than January 28, 1978" (33a) – Glickman was aware of the critical facts of both his injury and its cause and that by that date Glickman with reasonable diligence should have discovered the

critical facts. It further erred in holding that as of that date, tolling of the statute of limitations as against the CIA ended, and the statute started to run. That was an obvious and gross error of law by the Court of Appeals because Glickman at that very time sent three letters to the CIA, had three telephone conversations with the CIA, wrote two letters to Senator Kennedy and one letter to the Attorney General proclaiming his suspicion or even his belief – as held by the Second Circuit (32a-33a) – that he was an unsuspecting victim. Thus up to January 28, 1978 Glickman was reasonably diligent in attempting to learn whether he was a CIA victim. Therefore, there was an issue of fact on the tolling issue which was for the jury; it should not have been decided as a matter of law.

In *Bowen v. City of New York*, 476 U.S. 467, 480 (1986), this Court held: "on these facts, the equities in favor of tolling are compelling" based on the Court of Appeals' fact finding that:

> the **Government's secretive conduct** prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action ... the **full extent of the Government's clandestine policy was uncovered only in the course of this litigation**...

Likewise here, the "equities in favor of tolling are compelling." At the very time the Second Circuit here held that tolling ended, the CIA falsely denied

any knowledge of Glickman as a CIA victim. Thus the CIA's conduct at that time effectively continued its concealment of the facts and blocked plaintiff from learning about his injury and its cause.

In United States v. Kubrick, 444 U.S. 111, 122 (1979), this Court said: "the facts about causation may be in the **control** of the putative defendant, **unavailable** to the plaintiff or **at least very difficult to obtain**."

The facts about "causation" in Glickman's case were in the "control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." Indeed the facts here on tolling are as compelling as in *Barrett v. United States*, 689 F. 2d 324, 329-330 (2d Cir. 1982), *cert denied*, 462 U.S. 1131 (1983) (which was relied upon by the *Bowen* Second Circuit opinion, that was cited with approval in *Bowen*, 476 U.S. at 480) where the Second Circuit reversed summary judgment for defendants on statute of limitations and held:

> Thus, critical facts about causation and who inflicted Blauer's injury were in the control of the Government and very difficult for his estate to obtain. Indeed, the evidence indicates that some critical facts, such as the identity of the tortfeasor and the purpose for administering the drug, would not have been revealed no matter how diligently the estate had pursued its case in the 1950s ... Here there exist factual disputes both as to whether diligence was employed by the estate without success and whether the

> role of the Army Chemical Corps would in any event have been revealed. Thus, the instant situation is unusual because even if the plaintiffs knew what caused Blauer's death, **the path to unmasking who was responsible may well have been blocked. It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable effort, from finding out about it.**

Barrett is directly on point here; the Second Circuit, in that case, properly held that the issue of tolling is for the jury. That same court simply failed to apply the holding in *Barrett* to the facts here.

In *Baskin v. Hawley*, 807 F. 2d 1120 (2d Cir. 1986), the Second Circuit also reversed the District Court's grant of summary judgment on the ground of statute of limitations where the district court decided the disputed factual issue as a matter of law. ***Baskin* required that the disputed fact issue of "fraudulent concealment" for tolling the statute be reserved for the jury,** *Baskin*, 807 F. 2d at 1132: "It is... fundamental that a person who speaks has a duty to disclose enough to prevent his words from being misleading... This principle is plainly applicable to the question of whether a defendant has engaged in fraudulent concealment." The CIA's letters here, like in *Baskin*, were equally misleading.

Plaintiff's case for equitable tolling is even more compelling than the facts in *Barrett, Liuzzo v.*

United States, 485 F. Supp. 1274 (E.D. Mich 1980) and *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988) because in each of those cases there was a vital **disclosure** showing causation by the Army, FBI and CIA that effectively made the issue of equitable tolling one for the jury.

Harrison v. United States, 708 F.2d 1023 (5th Cir. 1983) conclusively demonstrates the lower courts' error here in holding that Mr. Glickman had the required "knowledge" to trigger accrual of his claim as of January 1978. The *Harrison* Court (id. at 1027) explained that a plaintiff has "knowledge" of a fact when the fact is true, the plaintiff believes it to be true and the belief is reasonably based. In contrast, "belief" requires only that the fact is true and the plaintiff believes it to be true. To get from "belief" to "knowledge," the "belief" must have a "reasonable basis" such as actual knowledge of a disclosure admitting causation as in *Barrett, Liuzzo and Orlikow.* As the *Harrison* Court held, conclusions based on suspicion, conjecture and speculation, even if true, are merely "belief" (id.). It follows that the Second Circuit's repeated statement that Glickman by January 1978 had formed a "belief" that he was one of the unsuspecting victims of the CIA's drug experimentation (32a-33a) did not become "knowledge" as there was no "reasonable basis" at that time to elevate "belief" to "knowledge". Accordingly, the Court of Appeals erred in holding as a matter of law that no later than January 28, 1978 Mr. Glickman knew the basic facts of his FTCA claim and failed to exercise reasonable diligence in

pursuing his claim between early 1978 and April 1981 (33a, 38a).[6]

The *Harrison* Court thus tolled the statute of limitations "until the date the Government disclosed an X-ray showing that the symptoms were caused by the Government's earlier malpractice" 708 F.2d at 1028. Here, plaintiff received no vital disclosure from the CIA as was done in *Barrett*, *Liuzzo*, *Orlikow* and *Harrison*, and therefore did not have the required "knowledge" by January 1978 or by December, 1979 – two years before he filed his administrative claim.

The Court of Appeals erred in deciding the tolling issue as a matter of law instead of remanding the issue to the district court for a bench trial.

II. THE COURTS BELOW ERRED BY HOLDING THAT THE SOURCES AND METHODS PRIVILEGE WAS "ABSOLUTE" AND BY OVERLOOKING THIS COURT'S AUTHORITY REQUIRING A "BALANCING" OF THE PARTIES' NEEDS

A. The Sources And Methods Privilege Was Erroneously Held To Be "Absolute"

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[6] The Second Circuit's use of the date April 1981 was actually within the two-year statutory period inasmuch as he filed his administrative claim in December 1981 and therefore must have been an inadvertent error.

Plaintiff relief on *Webster v. Doe,* 488 U.S. 592 (1988) but the lower courts chose to ignore that case. *Webster* requires the district court "to **balance** respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission" *(id. at 604).* Instead, the Magistrate, the District Court, and the Court of Appeals, held that the sources and methods privilege (50 U.S.C. §403-3(c)(5) and 403g) was "**absolute**. The Court need only determine whether the privileges are properly asserted, **not** whether a weighing of the equities favors one side or the other" (150a). That holding is fundamentally **inconsistent** with *Webster.* For that reason alone, this petition for certiorari should be granted.

The courts below erred in failing to do the requisite balancing. Here the injured plaintiff's need for discovery to prove his case is especially compelling inasmuch as defendants deliberately destroyed most of the relevant documents in 1973. Moreover, the "extraordinary needs of the CIA" here do not require disclosure of facts beyond the events relating to the Glickman case. The general CIA program was already investigated by Congress and thoroughly reported upon in the Church Committee Report, followed by the Kennedy Hearings in 1977. Realistically, the disclosures called for in these CIA documents – almost 50 years old – would not compromise the CIA's sources and methods.

This is an extraordinary case in which it is undisputed that (i) the program at issue was illegal

and unconstitutional (*see Glickman v. United States*, 626 F. Supp. 171 (S.D.N.Y. 1985)), (ii) there has been deliberate and extensive document destruction as well as a lengthy concealment of this inhumane program of mind altering experimentation, (iii) the Cold War, for which these programs were initiated, has ended, (iv) the documents are over 48 years old and (v) for purposes of the motion for summary judgment before the Second Circuit in 1998, it was conceded that an American gave Mr. Glickman an LSD laced drink in October, 1952 necessitating his hospitalization. Given this situation, the plaintiff plainly had a critical need for discovery of unredacted CIA documents to further support his claim that the CIA drugged him.

The district court's erroneous legal ruling on "absolute" privilege tainted much of that court's discovery and evidentiary rulings that took place after May 15, 1995 (134a).

B. The CIA Vitiated The 50 Document Sample

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) a concurring opinion by Justice Breyer stated: "It is thus essential in this science-related area that the courts administer the **Federal Rules of Evidence** in order to achieve the **'end[s]'** that the Rules themselves set forth, not only so that proceedings may be **'justly determined,'** but also so **'that the truth may be ascertained.'** Fed. Rule Evid. 102." That principle was violated by the rulings below on the validity of the sample after the

CIA's serious misconduct in tampering with the sample (29a-30a, 134a).

The Magistrate "ordered the defendants to produce for *in camera* review the **unredacted** copies of any fifty documents as chosen by plaintiff" (135a). Plaintiff, working under the extreme handicap of having to select from thousands of heavily redacted documents -- including 596 pages of documents that were **completely redacted** -- selected fifty (#1-#50).

Shockingly, and without any notice to plaintiff or the Magistrate, the CIA unilaterally substituted unredacted document no. 51 for unredacted document no.12 (193a). Petitioner learned of the secret substitution only when it sought confirmation of the sample.

The CIA's only explanation for this (193a) was that it "could not locate an unredacted copy" of document no. 12 and therefore, "it substituted" document no. 51". This was especially incredible in light of the CIA's detailed and tight security procedures, including among many other things, a locked vault (190a-192a). The CIA realistically vitiated the sample and violated the Magistrate's order by its conduct.

Aaron Tenenbein, Professor of Statistics at New York University, in his undisputed affidavit demonstrates that it is not "statistically valid to replace a document for one missing in the sample." Further, he concluded that "the assumption of probability sampling is **violated**" based on the CIA's unauthorized document substitution (186a). He stated (187a):

> This is not an accepted statistical practice. There is no justification for this procedure ... it can be inferred that the document is missing because there is a strong likelihood that it is pertinent ... [and] then the estimated percentage of pertinent documents in the frame would be 2% (1 out of 50 equals 2%). This would imply that the estimated number of pertinent documents in a frame of size 5,000 would be 100 ...

In addition, Professor Tenenbein opined that the "sample of 50 is **insufficient** because it simply has a very low probability of detecting a pertinent document if it existed in the frame" (188a).

The Magistrate simply failed to address the significance of plaintiff's submission on that switch in documents. On review, the district court held that the "absence" of document no. 12 has not prejudiced plaintiff in any way (134a). That ruling overlooked the uncontroverted affidavit of Professor Tenenbein that the "strong likelihood" is that missing unredacted document no. 12 is "pertinent" and that there are another estimated 100 documents that are pertinent in the frame of 5,000. Thus the CIA's deceptive conduct invalidated the 50 document sample and statistically, the sample, as ordered by the Magistrate, was inadequate, **clearly prejudicing** petitioner.

III. THE SECOND CIRCUIT ERRED IN OVERLOOKING AND FAILING TO APPLY THIS COURT'S DECISION IN *COOTER & GELL* ON ABUSE OF DISCRETION TO THE EVIDENTIARY RULINGS

The Second Circuit's standard of review of the trial court's evidentiary rulings was abuse of discretion. But the Court of Appeals overlooked and failed to apply this Court's holding of what constitutes such an abuse to evidentiary rulings. In *Cooter & Gell, v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) this Court said: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

Thus, even though there were errors of law and clearly erroneous assessments of the evidence made by the trial court on its evidentiary rulings, the Court of Appeals failed to recognize them as an abuse of discretion (6a, 8a). We recognize that this Court as recently as *General Electric Co. v. Joiner,* 522 U.S. 136, 141 (1997) has held that "abuse of discretion is the proper standard of review of a district court's evidentiary rulings [citing cases]." However, it is imperative that this Court clarify that holding in *General Electric* by applying the definition of "abuse of discretion" in *Cooter & Gell* to "abuse of discretion" on "evidentiary rulings." It is very important to each and every District Court, the Courts of Appeal in the federal system and the attorneys who practice in those courts that they

understand that the critical definition for abuse of discretion announced in *Cooter & Gell* is the proper legal standard that is applicable to evidentiary rulings. For that reason alone, this petition for certiorari should be granted.

A. There Were Numerous Errors Of Law And Clearly Erroneous Assessments Of The Evidence In Allowing Seven CIA Exhibits Into Evidence Under The Ancient Document Rule

An erroneous interpretation of the Federal Rules of Evidence is an error of law, *Hathaway v. Coughlin*, 99 F.3d 550 (2d Cir. 1996). Under *Cooter & Gell*, every error of law is an abuse of discretion.

Dr. Gottlieb's principal defense was that he never traveled overseas in 1952 and thus could not have drugged Mr. Glickman in October of that year. Respondent's evidence consisted almost exclusively of seven CIA documents relating to his overseas travel. These included (i) three from his **personnel file** produced on November 19, 1998 (DX E, F and G) (after the Second Circuit's reversal and remand for a jury trial solely against Dr. Gottlieb) – which admittedly "were responsive to plaintiff's request for documents reflecting defendant's longstanding discovery request for documents **[eleven years earlier]** reflecting defendant's foreign travel" (195a); (ii) three from his "**cover file**" produced in January 9, 1999 (DX JJJ, KKK and NNN) because they "**had been misfiled**" (208a);

and (iii) one document produced on January 14, 1999 DX HHHHH "which the CIA located [that] week" (209a) showing that Dr. Gottlieb had traveled overseas in the period **September-November 1952.** The district court allowed all of the above documents into evidence under the Ancient Document Rule, Rule 803(16), solely on the ground that they were **over 20 years old.**

The issue of authenticity under Rule 803(16) -- like the issue of trustworthiness under Rules 803(6) and (7) -- is a "crucial threshold **issue of law** going to admissibility, and it must be resolved first by the trial judge before it becomes a question of weight for the jury." *United States v. Robinson*, 544 F.2d. 110, 115 (2d Cir. 1976), *cert. denied*, 434 U.S. 1050 (1978). That legal principle was overlooked by the Court of Appeals.

Under Rule 803(16), the burden is on the defendant as the proponent of the contested documents to establish their authenticity. He failed to carry his burden. The district court erred in holding that merely because the documents were over 20 years old, they were authentic and admissible under Rule 901(b)(8) of the Federal Rules of Evidence. The district court overlooked the other two requirements of Rule 901(b)(8), to wit, that the document: "(A) is in such condition as to create **no suspicion** concerning its authenticity; (B) was in a place where it, if authentic, would likely be..."

Even though the district court failed to make any finding that the document was "in such condition as to create **no suspicion** concerning its authenticity," the Second Circuit held that the handwritten

insertions of the years 1953 and 1954 next to the typewritten entry of the month and day in DX G "does nothing to call into question their authenticity because there is no indication that these notations were altered or added after the fact." (6a). That holding is wrong and defies logic. The defendant's own CIA witness testified that he could not tell **"who"** made the handwritten insertion or **"when"** it was made (206a). The undisputed testimony clearly raised a **suspicion** concerning the authenticity of the handwritten insertions.

Moreover, Exhibit G was being offered because its first entry for Dr. Gottlieb's overseas travel -- even though subsequently handwritten in -- was 1953 and respondent's argument was that Exhibit G reflected all of his overseas travel. It was not the regular practice of Dr. Gottlieb to record **all** his overseas travel. He testified that for security reasons he traveled overseas at times without even advising his immediate supervisors (205a).

Furthermore, the Second Circuit failed to discuss the requirement that the documents must be "in a place where it, if authentic, would likely be" under Rule 901(b)(8)(B). The undisputed evidence on that point was that DX JJJ, KKK, NNN, and DX HHHHH were first produced in January 1999 on the ground they were "misfiled" – for eleven years! Clearly, they were **not** "in a place" where they "would likely be."

Rule 803(16) uses the word "statements" in documents admitted under the rule. The Second Circuit in *George v. Celotex*, 914 F.2d 26, 30 (2d Cir. 1990) previously interpreted Rule 803(16) as

limited to the admissibility **solely** of "statements" in the ancient document. The documents at issue only contained "statements" of Dr. Gottlieb's **1953** overseas travel. But 1953 overseas travel was not at issue and thus irrelevant. Therefore, the CIA should not have been permitted to introduce into evidence statements of 1953 travel to prove that Gottlieb did not travel overseas in 1952. Nonoccurences are not statements under Rule 803(16). There is a specific Rule governing nonoccurences - Rule 803(7). Petitioner submits that that is the rule that defendant had to and could not satisfy to get in the nonoccurence of 1952 travel. Therefore, the district court and the Court of Appeals decisions squarely conflicted with the *George* case and the explicit language of Rule 803(16) on an issue of law.

Petitioner does not contend that all exceptions to the hearsay Rule must be met, as the Second Circuit erroneously states (5a-6a). But, inasmuch as Rule 803(16) is limited solely to the admissibility of "statements" in ancient documents, whereas "nonoccurrences" are governed by Rule 803(7), which provides that a document is inadmissible to prove a nonoccurrence where the "sources of information or other circumstances indicate lack of trustworthiness," Dr. Gottlieb's travel records were not admissible under Rules 803(16) to prove a nonoccurrence. It was an error of law to so hold.

Contra the Second Circuit, *United States v. Kairys*, 782 F. 2d 1374, 1379 (7th Cir. 1986) is distinguishable (6a). Unlike the allegations there, that the Soviet Union regularly disseminated false information -- which was held to be insufficient to

raise doubts about the documents admissibility -- here, we know Gottlieb's travel records actually contain false information as to where and when he was at certain destinations.[7] Thus, here, based on all of the above, we have a solid basis to call into question said documents' trustworthiness.

Rule 803(7) permits proof of **nonoccurrence** of the event only after a **diligent search** failed to disclose the matter in regularly kept records. *United States v. Rich*, 580 F.2d 929, 938 (9th Cir. 1978), *cert. denied*, 439 U.S. 935 (1978). As this Court held in *Robinson*, 544 F.2d at 115: "Trustworthiness...relates to the thoroughness or diligence of the records search…a casual or partial search cannot justify the conclusion that there was no record." Here, respondent failed to offer any evidence of **any** search for documents relating to Dr. Gottlieb's 1952 overseas travel.

The "cumulative effect" of these errors on one issue – the admissibility of the seven challenged CIA documents – was far from harmless as it went to the central defense issue – whether Dr. Gottlieb traveled

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[7] The evidence demonstrated that CIA entries were unreliable for Dr. Gottlieb's overseas travel. Even though an entry showed Gottlieb traveled to Europe, in fact, it was the Congo; another entry showed that Dr. Gottlieb was in the Far East until December 1953, even though the respondent stipulated he was in the United States on November 18, 1953 (when Dr. Gottlieb supervised the LSD drugging of army scientists (207a)). Thus, Gottlieb's CIA travel records are incomplete, inaccurate and "indicate a lack of trustworthiness."

overseas in 1952. See *Phoenix Associates III v. Stone*, 60 F.3d 95, 105 (2d Cir. 1995).

B. The Court Below Failed To Follow This Court's Decisions In *Kumho And Daubert* In Determining Whether Respondent's Psychiatrist Expert Was Properly Qualified To Render a "Reliable" Opinion As To Whether Mr. Glickman Was A Victim Of An LSD Drugging

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,152 (1999), this Court held that an "expert, whether basing [his] testimony upon professional studies or personal experience" [must] employ [ ] in **the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant** field." In *Kumho*, this Court held (id. 147-148):

> In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but **reliable**." 509 U.S. at 589. In *Daubert*, the Court specified that it is the Rule's word **'knowledge,'** not the words (like "scientific") that modify that word, that **'establishes a standard of evidentiary reliability'** 509 U.S. at 589-590. ... *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other

witnesses on the 'assumption that the expert's opinion will have a **reliable basis** in the **knowledge and experience of his discipline**.'

Dr. Donald Klein, respondent's expert, was not a properly qualified psychiatrist **on LSD** to render an opinion as to whether Mr. Glickman was a victim of an unwitting LSD drugging.

Dr. Klein rendered a "differential diagnosis" opinion, which means that a psychiatrist considers the two most likely diagnoses and then decides which of the two best fits the patient. In order to decide which of the two most likely diagnoses – consuming LSD unwittingly or being a schizophrenic – best applied to Mr. Glickman, Dr. Klein needed the requisite expertise in **both** LSD and schizophrenia. Inasmuch as Dr. Klein's expertise related only to schizophrenia, and not to LSD, he could not reliably state that Mr. Glickman's psychotic reaction fit better for a schizophrenic than for LSD. Thus, Dr. Klein's opinion was not "reliable" because his lack of scientific knowledge about LSD made his "differential diagnosis" speculative.

Inasmuch as the facts stated below about Dr. Klein's lack of qualifications about LSD are **undisputed**, it follows as a matter of law, that Dr. Klein was not qualified to render an opinion to a reasonable degree of scientific certainty as to whether Mr. Glickman had consumed an LSD spiked drink without his knowledge.

Dr. Klein's concessions established that: (i) LSD was **"really out of [his] ken"** and was **"not really" part of his specialty** (201a); (ii) his work

relating to polydrug use (many drugs at the same time) did not qualify him to render an opinion related to the use of LSD by itself (203a); (iii) he did not author any works relating solely to LSD use; (199a); and (iv) **his psychiatric peers did not recognize him as an expert on psychedelic drugs** – none had ever referred any patient to him for treatment or consultation on such drugs (204a). Thus, Dr. Klein's admissions demonstrate that he did not possess the "same level of intellectual rigor that characterizes the practice of an expert in the field."[8]

The Court of Appeals' principal reliance was that Dr. Klein "testified that he was studied in the clinical and academic research concerning LSD" (8a). He failed to testify "what" he read and "when". Moreover, Dr. Klein conceded psychiatric patients are in fact "very variable and often very puzzling", and are not the way books make them sound – "nice and simple" (198a-199a). Accordingly, just reading about psychiatric patients does not provide the requisite "scientific... or specialized knowledge..." to allow testimony under Rule 702. Thus, the Second Circuit's characterization is a clearly erroneous assessment of Dr. Klein's testimony concerning his knowledge of LSD, in light of *Daubert v. Merrill*

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[8] The Second Circuit relied upon Dr. Klein's admission that he "only treated one patient who used LSD exclusively" (7a-8a) but that was rendered insignificant by Dr. Klein's concession that she was not part of his private practice, she never had any hallucinations or delusions (200a), and Dr. Klein **"didn't observe her, but [his] friend observed her"** (196a-197a).

Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Under *Cooter & Gell*, the Court of Appeals erred as a matter of law or made a clearly erroneous assessment of the evidence (7a-8a) in holding Dr. Klein was qualified to opine whether Mr. Glickman consumed an LSD–laced drink.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 13, 2000

Respectfully Submitted,

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Of Counsel:
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Janine Phillips

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2 day of May, Two Thousand

Filed U.S. Court of Appeals for the Second Circuit,
May 2, 2000
ROSEANN B. MACKECHNIE, CLERK

PRESENT: HON. ELLSWORTH VAN GRAAFEILAND,
HON. FRED I. PARKER,
Circuit Judges,

HON. STEFAN R. UNDERHILL,*
District Judge

GLORIA KRONISCH, Executrix of the Estate of Stanley Milton Glickman,

Plaintiff-Appellant,

v.

MARGARET GOTTLIEB, Executrix of the Estate of Sidney Gottlieb,

Defendant-Appellee.

APPEARING FOR APPELLANT:
Sidney Bender
Leventritt, Lewittes & Bender
New York, New York

APPEARING FOR APPELLEE:

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* The Honorable Stefan R. Underhill of the United States District Court for the District of Connecticut sitting by designation.

Martin Siegel
Assistant United States
Attorney for the Southern
District of New York, New York

Appeal from the United States District Court for the Southern District of New York (Kimba M. Wood, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said District Court be and it hereby is AFFIRMED.

Plaintiff-Appellant Gloria Kronisch is the executrix for the estate of Stanley Glickman, who originally filed a complaint in this action in 1983 against the United States; Richard Helms, former Director of the Central Intelligence Agency ("CIA"); and Dr. Sidney Gottlieb, a former CIA employee. The district court initially granted summary judgment in favor of all defendants, but a panel of this Court vacated and remanded part of that decision after finding that Kronisch had raised a sufficient issue of material fact with regard to Defendant-Appellee-Gottlieb that rendered summary judgment inappropriate. Kronisch v. United States, 150 F.3d 112, 132 (2d Cir. 1998). On remand, the United states District Court for the Southern District of New York (Dominick L. DiCarlo, Judge for the International Court of Trade,

sitting by designation)[1] conducted a three-week jury trial, which resulted in a verdict in favor of Defendant-Appellee Margaret Gottlieb, executrix for the estate of Sidney Gottlieb. On May 12, 1999, the district court (Kimba M. Wood, Judge) entered judgment for Gottlieb and dismissed Kronisch's complaint. Kronisch now appeals from this judgment, and we affirm.

On appeal, Kronisch raises seven issues: (1) the district court erred in admitting the documents detailing Gottlieb's travel in the 1950's because these documents were "concededly withheld by the CIA for 11 years and then selectively declassified solely for this litigation"; (2) the district court improperly "obliterated" the prior trial judge's adverse inference jury charge and gave the jury a "misleading charge on the crucial issue of deliberate destruction of documents"; (3) the district court erred by "improperly and unnecessarily" instructing the jury on the law during her summation following "defendant's attorney['s] . . . improper speaking objection"; (4) the district court erred in allowing testimony by an expert that was not qualified to

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[1] Judge DiCarlo died on the morning of April 27, 1999. Following a brief adjournment, Judge Kimba Wood presided over the remaining portions of the trial, including closing summations, the instruction of the jury, and the rendering of the verdict.

render an opinion; (5) the district court erred in excluding evidence that Glickman previously suffered from hepatitis because Gottlieb knew of research that suggested that LSD caused a heightened reaction in people who had suffered from hepatitis; (6) the district court erred in admitting photographs of Gottlieb's shoes to establish that Gottlieb was not clubfooted in 1952, and in refusing to allow a rebuttal witness to testify that Gottlieb's "foot and shoe condition was 'so well known' within the CIA in 1952"; and (7) the district court improperly excluded evidence from the Church Committee Report. For the reasons that follow, we reject each of Kronisch's arguments.

First, Kronisch argues that the district court erred in admitting documents, which pertained to Gottlieb's travel in the 1950s, that were disclosed after discovery was reopened on remand because these documents did not satisfy the requirements of Rules 803(6) and 803(7) of the Federal Rules of Evidence. These rules, which provide for certain exceptions to hearsay rule, allow for the admission of business records of public records, so long as the documents satisfy certain criteria. In the court below, however, the judge determined that the contested documents were ancient documents since they were over 20 years old, and thus were admissible under Rule 803(16) of the Federal Rules of Evidence. Kronisch argues that because the documents in question did not satisfy all of the

offered exceptions to the hearsay rule, the documents were improperly admitted. Kronisch does not provide any authority for this novel statement of the law, nor can we find any. Thus, we cannot conclude that the district court's decision to admit these documents was so "manifestly erroneous" as to require reversal. See Hathaway v. Coughlin, 99 F.3d 550, 555 (2d Cir. 1996).

At oral argument Kronisch also argued, for the first time in this Court, that the travel documents were not admissible under Rule 803(16) of the Federal Rules of Evidence because they did not satisfy the requirements of Rule 901 (b) (8) (A) of the Federal Rules of Evidence, in that the documents contained handwritten notations that created a "suspicion concerning [the documents'] authenticity." Fed. R. Evid. 901 (b) (8) (A). This argument is without merit. The fact that the documents in question were partially composed of handwritten notations does nothing to call into question their authenticity because there is no indication that these notations were altered or added after the fact. Furthermore, Kronisch's vague and speculative allegations about the authenticity of CIA documents are simply insufficient to establish that the documents are inadmissible. Cf. United States v. Kairys, 782 F.2d 1374, 1379 (7th Cir. 1986) (holding that mere allegations that Soviet Union regularly disseminated false information

were insufficient to raise doubts about document's admissibility).

Second, Kronisch argues that the district court improperly charged the jury about the inferences it was permitted to draw regarding the CIA's destruction of records. After reviewing the district court's instruction, we conclude that the instructions that were given did not misstate the applicable law and that the district court properly exercised its decision in refusing to give certain portions of Kronisch's requested instruction. The portions excised by the district court were either repetitive of other portions of the instruction, or they concerned matters that were not relevant to the adverse inference instruction.

Third, Kronisch argues that the district court improperly instructed the jury during her summation and that Gottlieb's two speaking objections during summation were improper and require reversal. Kronisch failed to raise any objection to preserve this issue at the time, however, and we therefore decline to address it on appeal.

Fourth, Kronisch argues that the district court erred in admitting the testimony of Gottlieb's expert, Dr. Donald Klein, because Dr. Klein admitted that the did not have actual experience with subjects who used LSD exclusively. The district court considered this argument during voir dire, but it ultimately rejected such a narrow reading

of Rule 702 of the Federal Rules of Evidence, which allows an expert to rely on "knowledge, skill, experience, training, or education." In this case, although Dr. Klein had only treated one patient who used LSD exclusively, he testified that he was studied in the clinical and academic research concerning LSD. Given this fact, we cannot conclude that the district court abused its discretion in allowing Dr. Klein's testimony. See Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

Fifth, Kronisch argues that the district court improperly excluded evidence that Gottlieb knew that LSD had a heightened effect on individuals with hepatitis. Kronisch maintains that this evidence tended to support her claim that Gottlieb targeted Glickman to test the effects of LSD. After examining the evidence in question, we cannot conclude that the district court abused its discretion in determining that this evidence was more prejudicial than probative. See United States v. Eisen, 974 F. 2d 246, 263 (2d Cir. 1992). The district court was well within its discretion in excluding this evidence in the absence of any proof that Gottlieb ever saw this evidence prior to the time Glickman was allegedly drugged.

Sixth, Kronisch argues that the district court erred in admitting pictures of Gottlieb's shoes taken in 1970 and 1998 because Gottlieb's wife admitted that he had had an operation in the 1960s to correct a problem with his feet. Kronisch did not present

any evidence, however, that Gottlieb's shoes changed at any time during this period. Furthermore, even if there were any error in admitting these two photos, it was surely harmless in light of the overwhelming evidence depicting Gottlieb wearing normal shoes at the time of the alleged drugging.

Kronisch also argues that the district court erred in refusing to allow the rebuttal testimony of John Gittinger, a former CIA employee who was to testify that it was widely known throughout the CIA that Gottlieb had a clubfoot and wore special shoes. The district court refused to allow this evidence after determining that it was improper rebuttal evidence. Specifically, the district court ruled that Kronisch knew about this evidence prior to the presentation of her case-in-chief. The district court is entitled to "wide discretion," FDIC v. Suna Assocs. Inc., 80 F.3d 681, 687-88 (2d Cir. 1996), in deciding whether to allow rebuttal testimony. Under the circumstances in this case, we cannot conclude that the court abused its discretion in refusing to allow the rebuttal testimony.

Finally, Kronisch argues that the district court improperly excluded testimony and excerpts from the Church Committee Report, which investigated CIA activities relating to LSD experimentation in the 1950s. The district court reviewed this evidence and determined that it contained "general statements" regarding the CIA's

activities. The district court concluded that these general statements, which did not include any specific mention of Gottlieb or the CIA's activities in France, rendered the statements of low probative value and would likely confuse the jury. After reviewing the materials in question, we find no abuse of discretion in the district court's determination that the evidence should not have been admitted under Rule 403 of the Federal Rules of Evidence.

For reasons set forth above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT,
Roseanne B. MacKechnie, Clerk

By: /s/
Lucille Carr, Operations Manager

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of August two thousand.

Kronisch

v. Dkt No: 99-6152

Gottlieb

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Gloria Kronisch.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that

heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

Filed U.S. Court of Appeals for the Second Circuit,
August 14, 2000
ROSEANN B. MACKECHNIE, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLORIA KRONISH, Executix of the Estate of Stanley Milton Glickman,

Plaintiff,

- against -

MARGARET GOTTLIEB, Executive of the Estate of Sidney Gottlieb,

Defendant.

JUDGMENT
83 CIVIL 2458 (KMW)

The issues in the above-entitled action having been brought on for trial before the Honorable Kimba M. Wood, United States District Judge, and a jury on April 8, 1999, and at the conclusion of the trial the jury having returned a verdict in favor of the defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and it is hereby dismissed.

DATED: New York, New York
May 10, 1999

SO ORDERED

/s/
Kimba M. Wood
USDJ

JAMES M. PARKISON
Clerk of the Court

By: /s/
Deputy Clerk

Filed U.S. District Court
Southern District Of New York,
May 11, 1999

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 5/12/97

APPENDIX D

United States Court of Appeals,
Second Circuit.

Gloria KRONISCH, Executrix of the Estate of Stanley Milton Glickman, Plaintiff-Appellant,
v.
UNITED STATES of America, Sidney Gottlieb, in his individual and in his official capacities, Richard Helms, in his individual and in his official capacities, and John Does, unknown agents of the Central Intelligence Agency, Defendants-Appellees.

No. 97-6116.

Argued Jan. 30, 1998.
Decided July 9, 1998.

*116 Sidney Bender, Leventritt Lewittes & Bender, New York City (Risa Bender, of counsel), for Plaintiff-Appellant.

Nancy G. Milburn, Assistant United States Attorney for the Southern District of New York, New York City (Mary Jo White, United States Attorney for the Southern District of New York, Steven M. Haber,

Assistant United States Attorney, of counsel), for Defendants-Appellees.

Before: CALABRESI, CABRANES, and HEANEY, [FN*] Circuit Judges.

FN* The Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eight Circuit, sitting by designation.

JOSE A. CABRANES, Circuit Judge:

Gloria Kronisch, executrix of the estate of Stanley Milton Glickman ("Glickman" or "plaintiff"), appeals from a judgment of the United States District Court for the Southern District of New York (Kimba M. Wood, Judge) granting summary judgment in favor of defendants. Glickman brought suit against the United States of America and two officials of the Central Intelligence Agency (the "CIA"), Sidney Gottlieb and Richard Helms, alleging that he was one of the victims of the CIA's program to test the effects of mind-altering drugs, including lysergic acid diethylamide ("LSD"), on unwitting subjects beginning in the early 1950s. Glickman claims that Gottlieb or some other agent of the United States government placed LSD in his drink in a Paris cafe in October 1952. The district court, adopting in full the conclusions of the Report and Recommendation of Magistrate Judge Naomi Reice Buchwald, granted defendants' motion for summary judgment on the bases that plaintiff had

failed to establish a genuine issue of material fact as to liability, that his claims were time-barred, and that the court lacked personal jurisdiction over Gottlieb and Helms. We affirm in part, vacate in part, and remand.

I.

A. The CIA's Drug-Testing Programs

The Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by the late Senator Frank Church of Idaho (the "Church Committee"), held hearings in 1975 to investigate various CIA activities, including the testing and use of chemical and biological agents by the intelligence community. The final report of the Church Committee, published in 1976, explained that the CIA was acutely concerned in the late 1940s and early 1950s that the Soviet Union, China, and other Communist countries had used, or were developing the capacity to use, chemical and biological agents and other techniques for purposes of interrogation, brainwashing, and attacks against United States and Allied personnel abroad. See Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. (Apr. 26, 1976), at 392 ("Church Committee Report"). "Of particular *117 concern was the drug LSD."

[FN1] Id. As described by the Church Committee Report,

> FN1. As the Church Committee Report explains:
>
> > The CIA had received reports that the Soviet Union was engaged in intensive efforts to produce LSD; and that the Soviet Union had attempted to purchase the world's supply of the chemical. As one CIA officer who was deeply involved in the work with this drug described the climate of the times: "[It] is awfully hard in this day and age to reproduce how frightening all of this was to us at the time, particularly after the drug scene has become as widespread and as knowledgeable in this country as it did. But we were literally terrified, because this was the one material that we had ever been able to locate that really had potential fantastic possibilities if used wrongly." Id. at 392-93, 91 S.Ct. 1999 (quoting testimony of CIA officer, 11/21/75) (alteration in original).

In order to meet the perceived threat to national security, substantial programs for the testing and use of chemical and biological agents--including projects involving the surreptitious administration of LSD to unwitting nonvolunteer subjects at all social levels, high and low, native American and foreign--were conceived, and implemented. These programs resulted in substantial violations of the rights of individuals within the United States.

Id. at 393 (internal quotation marks omitted). In the late 1970s, at the request of the Subcommittee on Health and Scientific Research of the Senate

Committee on Human Resources, chaired by Senator Edward M. Kennedy of Massachusetts (the "Kennedy Committee"), the CIA attempted to identify victims of the drug tests. The CIA ultimately identified sixteen unwitting subjects of LSD tests in the United States, but did not identify any victims of overseas testing.

The earliest CIA program involving the use of chemical and biological agents was approved by the Director of Central Intelligence ("DCI") in 1950. Id. at 387. Known initially as Project BLUEBIRD and renamed ARTICHOKE in August 1951, the objectives of this program were the development of defensive techniques for resisting interrogation as well as "the evaluation of offensive uses of unconventional interrogation techniques, including hypnosis and drugs." Id. The project included both controlled in-house experiments regarding interrogation techniques, as well as overseas interrogations on foreign nationals using nonhallucinogenic drugs (so-called "truth serums") that occurred in "safehouses" or other secure locations. See id. at 387-88. The overseas interrogations were conducted upon known or suspected foreign intelligence agents, double agents, and defectors, but, according to the government, also may have included persons not suspected of espionage or wrongdoing. See Declaration of Nancy G. Milburn, Assistant United States Attorney for the Southern District of New

York, in Support of Defendants' Motion for Summary Judgment, Exhibits 4-8 (April 25, 1996) ("Milburn Declaration"). During two overseas trips in 1952, interrogations were conducted by ARTICHOKE teams using "new drugs," identified as seconal, dexedrine, and marijuana. Id. Ex. 10. The documents contained in the record before us do not indicate the use of hallucinogenic drugs such as LSD as part of the BLUEBIRD/ARTICHOKE Program, nor do the BLUEBIRD/ARTICHOKE documents indicate that interrogations took place in France--where Glickman alleges he was drugged in October 1952--or that they were performed on Americans overseas. See Kronisch v. United States, No. 83 Civ. 2458, 1997 WL 907994, at *5-*6 (S.D.N.Y. April 14, 1997) ("Kronisch III ").

Based on a proposal to the DCI from defendant Richard Helms--then the CIA's Assistant Deputy Director for Plans--the CIA's technical research component, known as the Technical Services Division ("TSD"), initiated Project MKULTRA, the agency's principal project to study the effects of chemical and biological agents on human behavior. See Church Committee Report at 389-90. Although not formally approved by the DCI until April 13, 1953, id. at 390, Project MKULTRA was "actively underway since the middle of 1952." Milburn Declaration, Ex. 23. MKULTRA included 149 subprojects that the CIA contracted out, by means of a special funding mechanism intended to

ensure the highest level of secrecy, to specialists in universities, hospitals, pharmaceutical houses, and public and private institutions. *118 See Church Committee Report at 390-91; Kronisch III, 1997 WL 907994, at *6; Milburn Declaration, Ex. 28. Defendant Sidney Gottlieb, who at the time was Chief of the Chemical Division of TSD, was put in charge of planning and organizing MKULTRA in 1952.

As described in the Church Committee Report, LSD was one of the materials tested in the MKULTRA program, and that testing included the "surreptitious administration [of LSD] to unwitting nonvolunteer subjects in normal life settings by undercover officers of the Bureau of Narcotics acting for the CIA." Church Committee Report at 391. In the view of the CIA, such surreptitious testing was important because the "testing of materials under accepted scientific procedures fails to disclose the full pattern of reactions and attributions that may occur in operational situations." Id. (internal quotation marks and citation omitted). The record shows that Bureau of Narcotics Agent George White, who was asked by Gottlieb in 1952 to work on LSD research for the CIA, see Declaration of Sidney Gottlieb P 4 (April 23, 1996) ("Gottlieb Declaration"), conducted LSD experiments on unsuspecting persons in New York City. White may have given LSD to unwitting friends in his New York City apartment in November 1952, and

beginning in June 1953 he administered LSD to unsuspecting persons (typically drug informants and prostitutes) with whom he came into contact in his work as a narcotics agent. See Kronisch III, 1997 WL 907994, at *6 n. 8. He may also have administered LSD to one or more unsuspecting persons at a bar. See Hearings Before the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources on S. 1893, 95th Cong., 1st Sess. 204 (Sept. 20 and 21, 1977) ("Kennedy Committee Hearings") (testimony of Sidney Gottlieb).

In addition to testing LSD on unwitting subjects in the United States, "[a] special procedure, designated MKDELTA, was established to govern the use of MKULTRA materials abroad." Church Committee Report at 391. The Church Committee determined "that the use of these materials abroad began in 1953, and possibly as early as 1950." Id. (emphasis added). Defendants assert that overseas use of LSD was limited to formal interrogation settings, and that these interrogations were performed exclusively on foreign nationals. They claim that Gottlieb traveled overseas to participate in these interrogations on three occasions between late 1953--a year or more after plaintiff's alleged incident--and 1956. They assert that the first of these trips was to the Far East, and while national security concerns prevent them from divulging the locations of the other two interrogations, they have

represented that neither occurred in France. See Brief of Defendants-Appellees at 8. Other than these three occasions, defendants assert that "neither Gottlieb nor anyone else in TSD participated in any overseas interrogations or operations in which a person was given LSD." Id.

However, as the Church Committee Report indicates, "[b]ecause MKULTRA records were destroyed, it is impossible to reconstruct the operational use of MKULTRA materials by the CIA overseas." Church Committee Report at 391. MKULTRA records were destroyed in January 1973 by TSD personnel acting on the orders of Gottlieb, who in turn had obtained approval from Helms. See id. at 389. During hearings into the CIA's drug-testing activities held by the Kennedy Committee, Gottlieb testified that he had ordered the files destroyed for three reasons: to hide the identities of researchers who had assisted the CIA on express assurances of confidentiality; to prevent the records (many of which were incomplete) from being misunderstood once he and others who were most familiar with the program retired; and as part of a CIA-wide drive to reduce the amount of paper it stored. See Kennedy Committee Hearings at 195 (testimony of Sidney Gottlieb).

The destruction of MKULTRA documents "made it impossible for the [Church] Committee to determine the full range and extent of the largest

CIA research program involving chemical and biological agents," and "prevented the Committee from determining the full extent of the operations which made use of materials developed in the MKULTRA program." Church Committee Report at *119 404. However, many financial records related to MKULTRA--some of which referred to substantive aspects of the program--did escape destruction, and were the subject of testimony by Gottlieb and others at the Kennedy Committee hearings. Neither that testimony nor any of the recovered financial records contain any reference to plaintiff, or to overseas testing of LSD on unwitting subjects in France, or to any overseas testing in 1952, when Glickman claims to have been drugged. The record also shows, however, that few if any Americans other than those working with the CIA had access to LSD in the early 1950s.

B. Glickman's Personal History

[1] On appeal from a grant of summary judgment for defendants, we are required to view the facts in the light most favorable to plaintiff. See Lightfoot v. Union Carbide Corp., 110 F.3d 898, 908 (2d Cir.1997). From that standpoint, Glickman's personal history includes the following:

In October 1952, Glickman was pursuing a promising career as an artist in Paris. He was approached one evening by an acquaintance who

asked Glickman to accompany him to the Cafe Select to meet some American friends. Upon meeting these men at the Cafe Select, Glickman and the men engaged in several hours of contentious debate on political issues. As Glickman prepared to leave, one of the men offered Glickman a drink as a conciliatory gesture, and Glickman eventually accepted. Rather than call over the waiter, the man walked to the bar to get the drink, at which point Glickman observed that he had a clubfoot. Halfway through the drink, Glickman "began to experience a lengthening of distance and a distortion of [his] perception," and he observed that "[t]he faces of the gentlemen flushed with excitement as they watched the execution of the drink." Affidavit of Stanley Milton Glickman P 13 (August 20, 1983). One of the men then "brought the topic of discussion to the working of miracles," id., and suggested to Glickman that surely he would be capable of this power. Glickman left the cafe and experienced distortions of color and other hallucinations, believing that he had been poisoned. When Glickman awoke the next morning, he was hallucinating intensely.

For approximately two weeks, Glickman "wandered in the pain of madness, delusion and terror," and then decided to return to the Cafe Select, where he "consciously closed [his] eyes to wait for 'someone' to come and tell [him] what had happened." Id. P 16. He was then carried from the cafe, placed on

the floor of an automobile, and taken to the American Hospital of Paris, where he was admitted on November 11, 1952. Glickman remained in the hospital for two days, during which time he was examined and given electroshock treatment. He signed himself out of the hospital against the wishes of his attending physician, but returned a day later and remained as a patient for seven days--during which time he believes he was given additional doses of hallucinatory drugs--until a friend arrived and helped him to sign out and to return to his studio. Over the next ten months, Glickman remained mostly in his studio, experiencing "stress, terror, hallucination and difficulty eating," which "reduced [his] body to a feeble quality." Id. P 20. When friends of his brother-in-law's family saw him on the street and observed his condition, they contacted Glickman's family, who arranged for him to be brought back to the United States in July 1953.

Glickman was treated by a doctor for several weeks, and his physical condition began to improve, but his mental condition did not. He saw psychiatrists on a few occasions, but refused to continue treatment. Over the next twenty-five years, he held various odd jobs but never painted again and never led a normal social life. Glickman died on December 11, 1992.

C. Procedural History

In 1977, Glickman's sister, Gloria Kronisch, called him and said that she had read an article indicating that the CIA "had experimented with L.S.D. on unsuspecting persons in foreign countries in the 1950's." Id. P 28. Kronisch sent Glickman the article, and Glickman began to watch the Kennedy Committee hearings on television. It was at this time that Glickman first formed a belief that he had been drugged by the CIA in 1952. ***120** During the latter months of 1977 through the end of January 1978, Glickman expressed this belief in letters to Senator Kennedy, the CIA, and the Attorney General, and at some point he unsuccessfully sought legal representation. After a friend, Dean Corren, traveled to Washington in April 1981 and obtained additional information about the CIA's drug-testing programs by examining the CIA files that had earlier been made public pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. S 552, Glickman filed an administrative tort claim with the CIA on December 22, 1981. The CIA denied the claim by letter dated December 1, 1982. Glickman filed this suit on March 30, 1983.

Glickman sued defendant United States under the Federal Tort Claims Act, 28 U.S.C. S 2671 et seq. ("FTCA"), raising common-law tort claims of negligence, invasion of privacy, misrepresentation, and intentional infliction of emotional distress. He

also sued defendants Gottlieb and Helms in their individual capacities and in their official capacities as former employees of the CIA, [FN2] under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), raising claims under the First, Fourth, Fifth, and Eighth Amendments to the United States Constitution. The case languished as the result of a series of delays, see Kronisch v. United States, No. 83 Civ. 2458, 1994 WL 524992, at *2 (S.D.N.Y. Sept. 27, 1994) ("Kronisch I ") (describing procedural history), and after discovery was completed, [FN3] defendants moved for summary judgment. The Magistrate's Judge's Report and Recommendation recommended that the motion be granted on the bases that plaintiff's claims were untimely, that plaintiff had failed to establish a genuine issue of material fact on the merits, and that the court lacked personal jurisdiction over Gottlieb and Helms. Judge Wood adopted the recommendations of Magistrate Judge Buchwald in their entirety, and granted defendants' motion. See Kronisch III, 1997 WL 907994.

FN2. The district court dismissed the complaint against Helms and Gottlieb insofar as it sought money damages from them in their official capacities. See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir.1994) (Bivens claim for money damages can only be brought against federal official in his individual capacity). Appellant does not challenge this disposition on appeal.

FN3. "In the course of discovery, defendants produced approximately thirty thousand pages of documents, many of which were heavily redacted by the CIA on the basis of the statutory privileges established by the National Security Act of 1947, 50 U.S.C. S 403-3(c)(5), and the Central Intelligence Agency Act of 1949, 50 U.S.C. S 403g, and the state secrets privilege. In addition, a relatively small amount of information was redacted pursuant to the Privacy Act of 1974, 5 U.S.C. S 552a." Kronisch I, 1994 WL 524992, at *1 (footnote omitted). Plaintiff sought leave to move to compel disclosure of the redacted material. To determine whether to permit plaintiff to make this motion, Magistrate Judge Buchwald requested that plaintiff choose fifty documents that he believed would be most advantageous to his case, which the court then reviewed in camera in unredacted form to determine whether they contained any relevant information and whether the privilege assertions were well-founded. The parties submitted additional materials to aid the court in making this determination. See id. The CIA was unable to locate an unredacted copy of one of the requested documents, and instead submitted in its place an unredacted copy of a different document requested by plaintiff. Magistrate Judge Buchwald sustained the United States' assertions of privilege, found the unredacted documents to be irrelevant to plaintiff's claim, and denied plaintiff leave to move to compel the production of unredacted material in the remaining documents. See 1994 WL 524992. Judge Wood subsequently affirmed Magistrate Judge Buchwald's discovery order. See Kronisch v. United States, No. 83 Civ. 2458, 1995 WL 303625 (S.D.N.Y. May 18, 1995) ("Kronisch II"). Substantially for the reasons stated by the district court, we believe that the court did not abuse its "wide discretion in managing pre-trial discovery,"

B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir.1996), and, having viewed the unredacted versions of the documents ourselves, we affirm the district court's discovery order. We have considered plaintiff's challenges to the district court's order, and find them to be without merit.

II.

A. Statute of Limitations

[2] We review de novo the district court's determination that plaintiff's claims are barred by the statute of limitations. See Eagleston v. Guido, 41 F.3d 865, 870 (2d Cir.1994).

1. FTCA Claims

[3] The FTCA provides that "[a] tort claim against the United States shall be forever *121 barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. S 2401(b). Inasmuch as plaintiff filed an administrative claim with the CIA on December 22, 1981, his FTCA claim against the government is untimely if it accrued prior to December 22, 1979.

[4][5][6] Ordinarily, a plaintiff's FTCA claim accrues at the time of injury. See Barrett v. United States, 689 F.2d 324, 327 (2d Cir.1982) However, in cases such as this one, where the government

conceals the acts giving rise to plaintiff's claim, or where plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the so-called "diligence-discovery rule of accrual" applies. [FN4] Under this rule, "accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." Id. Discovery of the "critical facts" of injury and causation is not an exacting requirement, but requires only

> FN4. Defendants do not contest that the diligence-discovery rule of accrual applies in this case. The only dispute is when plaintiff's claims accrued under this rule.

knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it.... [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.

Guccione v. United States, 670 F.Supp. 527, 536 (S.D.N.Y.1987) (citations omitted) (Motley, J.), aff'd on other grounds, 847 F.2d 1031 (2d Cir.1988), cert. denied, 493 U.S. 1020, 110 S.Ct.

719, 107 L.Ed.2d 739 (1990). A claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, see Hobson v. Wilson, 737 F.2d 1, 35 (D.C.Cir.1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), but such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence, see id. at 35 & n. 107.

We agree with the district court that Glickman was aware of the basic facts of his FTCA claim before December 22, 1979. Glickman first came to believe that he had been drugged by the CIA in 1977, when he was told by his sister about the Kennedy Committee hearings and began to watch the hearings on television. As Glickman testified at his deposition, after watching the Kennedy Committee hearings in 1977 and learning of the CIA's drug tests on unsuspecting persons in the 1950s, he reached "the logical conclusion after remembering the events of my life in 1952 that I was one of those victims." On October 3, 1977, Glickman made a FOIA request to the CIA for copies of any documents filed under his name or containing his name, believing that "inasmuch as I was one of [their] victims, they would have my record in my personal file." Deposition of Stanley Milton Glickman at 283 (October 23, 1987) ("Glickman Deposition"). Upon receiving a response from the CIA advising him that the agency's only record was of one Stanley Glickman from Illinois who had

received employment information from the CIA in 1976, Glickman responded, by letter dated January 30, 1978, that he was not that individual, and added that "as an aid to your search I will specify that Paris[,] France in the 1950's is the area for you to focus upon." Glickman also wrote to Senator Kennedy on October 11, 1977, urging him to identify the individual victims of the CIA's tests. Senator Kennedy responded, by letter dated November 1, 1977, that neither the CIA nor the Kennedy Committee had yet been able to identify victims, "principally due to the fact that the records concerning these tests were destroyed in 1973." Glickman again wrote to Senator Kennedy on January 28, 1978, asking him for help in obtaining his records from the CIA, and stating that "[m]y continued interest in the subject of CIA drug experimentation on unsuspecting persons in the 1950's is due to my belief that I AM ONE OF THOSE PERSONS." Finally, Glickman sought help from Attorney General Griffin Bell, informing him in a letter dated November *122 9, 1977 that Glickman believed himself to be a victim of a CIA drug experiment, and asking him to expedite Glickman's receipt of CIA files.

Accordingly, it is clear that Glickman had formed a firm belief prior to December 22, 1979--and certainly no later than January 28, 1978, the date of his second letter to Senator Kennedy--that he had been an unwitting victim of a CIA drug experiment.

Moreover, based on the information he possessed prior to that date, Glickman believed strongly enough in his claim to (unsuccessfully) seek legal representation. See Guccione, 670 F.Supp. at 536 ("[A] claim will accrue when the plaintiff knows, or should know, enough ... to protect himself by seeking legal advice.") (citing United States v. Kubrick, 444 U.S. 111, 122-25, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). [FN5] Glickman's firmly expressed belief in his claim and his effort to seek legal advice undermine his later contention that he had only a mere "hunch" or "suspicion" of his injury and its cause.

> FN5. The record is not clear as to exactly when Glickman first sought legal advice, although Glickman's deposition testimony suggests that it was as early as 1977 or 1978. In any event, there is no suggestion in the record that Glickman's decision to seek legal advice--even assuming arguendo that he first did so after December 22, 1979--was based on any new information beyond that which he possessed as early as 1977. The relevant point is that before December 22, 1979, Glickman's belief that he had been drugged by the CIA was sufficient for him to have been aware of the need to protect himself by seeking legal counsel. Although Glickman was not successful at the time in obtaining counsel, this fact alone is not dispositive. Inasmuch as Glickman, at the time he sought counsel, knew enough to assert the basic outlines of a cause of action capable of surviving a motion to dismiss for failure to state a claim, the fact that counsel was unwilling to take the case, and to develop further facts through court-ordered discovery, does not prevent the statute of

limitations from running. See Kubrick, 444 U.S. at 124, 100 S.Ct. 352 ("If [plaintiff] fails to bring suit because he is ... mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim....").

In any event, even if plaintiff's awareness of his injury and its cause prior to December 1979 could only be characterized as a mere "hunch" or "suspicion," plaintiff would still have been under a duty to diligently investigate his claim. See Hobson, 737 F.2d at 35 & n. 107. However, after his initial inquiries in 1977 and the early part of 1978, plaintiff took no further steps whatsoever to pursue his claim until April 1981, when his friend Dean Corren went to Washington to examine publicly available CIA files. Accordingly, plaintiff's FTCA claim is untimely both because he was aware of the basic facts of his injury and its cause more than two years before filing his administrative claim, and because he failed to exercise due diligence in pursuing his claim. Although plaintiff contends that his claim did not accrue until Corren's trip to Washington in 1981, which provided Glickman with more concrete information about the CIA's drug-testing program, this information was merely a more detailed description of the program of which Glickman became aware as early as 1977, and which had given rise to his firm belief at that time that he was one of the victims of this program. Indeed,

information of the sort obtained by Corren was publicly available (among other places, in the Church Committee Report) long before April 1981, and Glickman offers no explanation as to why he did not try to obtain such information sooner.

[7][8] Plaintiff argues that the responses he received from the CIA and the Justice Department to the letters he sent them were misleading, and constituted a "fresh concealment" [FN6] that should toll the statute of limitations. ***123** This argument is without merit. The CIA merely informed Glickman, in a letter dated February 10, 1978, that it had completed the search of its files and had uncovered no record of him. Even assuming arguendo the merits of Glickman's claim, there is no reason to believe that this response was inaccurate in light of the destruction of MKULTRA documents in January 1973. Moreover, at the time he received the CIA's response, Glickman was already aware, from Senator Kennedy's letter of November 1, 1977, that the MKULTRA files had been destroyed in 1973. Therefore, the fact that the CIA uncovered no documents containing Glickman's name should not have come as a surprise to him--much less can it be characterized as an obstructive "concealment" warranting the tolling of the statute of limitations. Indeed, although Glickman took no further actions to investigate his claim until April 1981, he stated at his deposition that, even after being told that the CIA had no records of him, he

continued to believe that he was a victim of a CIA experiment. As to the Department of Justice's response of December 7, 1977, that letter did nothing more than inform Glickman, who had requested that the Department expedite the CIA's response to his FOIA request, that the Department lacked jurisdiction to do so and that the inquiry did not appear to merit a special investigation by the Attorney General. This letter cannot be regarded as a "concealment" that should toll the statute of limitations.

FN6. The original concealment that occurred by virtue of the destruction of MKULTRA documents in 1973 did not continue to toll the statute of limitations once Glickman became aware of the basic facts of his claim in 1977-1978. See, e.g., Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir.1995) ("[W]hen a defendant fraudulently conceals the wrong, the time limit of the statute of limitations does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action.") (emphasis added; internal punctuation and citation omitted). To the extent that plaintiff argues otherwise, he seems to be suggesting that without the destroyed documents, he could not have been reasonably certain that he was drugged by the CIA. However, if plaintiff needed to be reasonably certain that the government caused his injury in order for his FTCA claim to accrue, Glickman's claim would not have accrued to this day, and might never accrue. A plaintiff need not have compelling proof of the validity of his claim in order for his claim to accrue--indeed, in cases where plaintiff's claim is ultimately misconceived, such

> proof will not exist--but must simply have formed a firm belief in his claim based on his awareness of the basic facts of injury and causation.

In sum, because plaintiff was aware of the basic facts of his FTCA claim prior to December 22, 1979, and because he failed to exercise reasonable diligence in pursuing his claim between early 1978 and April 1981, his FTCA claim against the United States is untimely under the applicable two-year statute of limitations.

2. Bivens claims against Helms and Gottlieb

Plaintiff alleges Bivens claims against defendants Helms and Gottlieb for violating his constitutional rights by "devising and executing a program of experimental L.S.D. testing and electro shock treatment, of which the Plaintiff was a subject." Amended Complaint of Stanley Milton Glickman PP 44-53. He also alleges that Gottlieb was the actual person who gave him the drink laced with LSD. See id. P 18. We conclude that plaintiff's Bivens claims are untimely except insofar as they allege that Gottlieb was actually the person who gave plaintiff the LSD-laced drink.

[9][10][11] Federal courts in New York apply a three-year statute of limitations period to Bivens claims. See Chin v. Bowen, 833 F.2d 21, 23-24 (2d Cir.1987). While state law supplies the statute of limitations period, "federal law determines when

a federal claim accrues." Eagleston, 41 F.3d at 871. Under federal law, the limitations period governing plaintiff's Bivens claims, like the period governing his FTCA claims, will be equitably tolled so long as defendants' concealment of their wrongdoing prevented plaintiff from becoming aware of, or discovering through the exercise of reasonable diligence, his cause of action. See Barrett, 689 F.2d at 327 ("[R]ead into every federal statute of limitations is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.") (internal punctuation and citation omitted). Accordingly, inasmuch as plaintiff filed his complaint against Gottlieb and Helms on September 13, 1983, his claims against them are untimely if he was aware of these claims, or should have been aware of them through the exercise of reasonable diligence, before September 13, 1980. [FN7]

FN7. The district court observed that "[c]onceivably, plaintiff could argue that the limitations period for his Bivens claims should be tolled during the pendency of his administrative tort claim," Kronisch III, 1997 WL 907994, at *15, although the court did not cite any authority in support of this proposition. The court went on to find, in any event, that plaintiff's Bivens claims accrued more than three years before the filing of his administrative claim in December 1981, and therefore the court had no occasion to

decide whether the limitations period should be tolled during the pendency of the administrative claim. Plaintiff does not argue on appeal that the filing of an administrative claim tolls the statute of limitations for a Bivens suit, and we therefore have no occasion to consider the question.

*124 [12] Insofar as plaintiff alleges that Helms and Gottlieb are liable for devising and executing a program of covert CIA drug testing of which plaintiff was a subject, we agree with the district court that these claims accrued at or about the same time as plaintiff's FTCA claims against the government--in no event later than January 28, 1978, well before September 1980. It is undisputed that, after learning of the Kennedy Committee hearings and watching some of the testimony on television, Glickman was aware in 1977 that Gottlieb headed the CIA's drug experimentation program in the 1950s. See Original Affidavit of Stanley Milton Glickman P 27 (appended to Affidavit of Stanley Milton Glickman (August 20, 1983)). Moreover, if in the exercise of reasonable diligence plaintiff had made any inquiries into which other CIA officials had authority over the agency's drug testing program, it is clear that plaintiff would have been able to identify Helms. Among other things, Helms's role was well documented in the Church Committee Report. Indeed, plaintiff does not argue that he could not have discovered Helms's role within

the limitations period. See Kronisch III, 1997 WL 907994, at *16. Rather, plaintiff argues that the limitations period for his Bivens claims should be tolled for the same reasons as he advances with respect to his FTCA claims. We reject these arguments for the reasons stated above.

[13] Our analysis differs, however, with respect to plaintiff's claim that Gottlieb himself was the person who laced Glickman's drink with LSD. Although plaintiff knew in 1977 that Gottlieb headed the CIA's drug testing program, he only first came to believe that Gottlieb himself was the man who gave him the drink in the Cafe Select when Corren asked him, upon returning from Washington in April 1981, whether any of the men in the cafe had a clubfoot. Plaintiff alleges that he then recalled that the man who gave him the drink was indeed clubfooted--a characteristic, Corren informed him, that was shared by Gottlieb. To the extent that plaintiff's Bivens claims are based on the allegation that he was drugged by somebody connected with the CIA--pursuant to a program installed and executed by Helms and Gottlieb-- plaintiff was clearly on notice of these claims. However, it is less clear-- and, we believe, a question for the jury--whether plaintiff should have been able, through the exercise of due diligence, to plausibly connect Gottlieb to the man in the cafe prior to being told by Corren that Gottlieb had a clubfoot. See Guccione, 670 F.Supp. at 537 ("The question whether [a

plaintiff] knew or should have known the critical facts of his claim, and the subsidiary question of whether he exercised due diligence to discover them are ordinarily matters for the finder of fact," except where "it is beyond dispute that plaintiff should have known [or] indeed, actually knew the critical facts of his claim.").

Defendants contend that "[a]ssuming solely for argument that one could reasonably infer from Gottlieb's clubfoot that he personally participated in plaintiff's alleged injury, plaintiff's reasonably diligent inquiries between 1978 and 1981 could have alerted him to Gottlieb's foot condition, which is discussed in [John] Marks's book, [The Search for the 'Manchurian Candidate']." [FN8] Brief of Defendants-Appellees at 35. We believe that this is a question of fact for the jury. It is not so clear that the exercise of reasonable diligence prior to April 1981 would have led Glickman to identify Gottlieb as the clubfooted man who allegedly drugged him in 1952 that we may conclude as a matter of law that Glickman failed to fulfill his duty of due diligence. See Orlikow v. United States, 682 F.Supp. 77, 83-85 (D.D.C.1988) (refusing to *125 find that plaintiffs' claims arising from MKULTRA drug tests were untimely based on plaintiffs' failure to read Marks's book or particular articles about the CIA's drug testing program, and concluding that these issues of diligence were for the jury).

FN8. John Marks was a former Senate aide and State Department official whose book, The Search for the "Manchurian Candidate," based on thousands of pages of CIA documents obtained through the FOIA, gave a detailed description of the CIA's drug-testing programs. The documents reviewed by Corren in 1981 were apparently the ones originally made public pursuant to Marks's FOIA request. See Affidavit of Dean R. Corren P 2 (August 19, 1983).

Similarly, the fact that Glickman may have watched Gottlieb testify during the 1977 Kennedy Committee hearings does not require the conclusion that, as a matter of law, Glickman should have been able to connect him to the man in the Cafe Select prior to April 1981. First of all, notwithstanding the district court's observation that "Glickman has stated that he watched on television as Gottlieb testified about the [CIA's drug-testing] projects before the United States Senate," Kronisch III, 1997 WL 907994, at *16, in fact the record contains conflicting evidence as to whether Glickman actually watched Gottlieb testify, or whether he simply was aware of Gottlieb's role within the agency from other witnesses' testimony, but did not see Gottlieb himself testify. See Glickman Deposition at 283 (stating, in response to question as to how Glickman had concluded that the CIA was responsible for drugging him, "I believe that newspaper article or the television program had stated while Mr. Gottlieb was on TV at the time, or his testimony was on, I don't know that I saw him, but I believe--I don't remember who testified, but

there was information given of the programs and their overseas--of their use of LSD in the 1950s. I don't know whose testimony I heard."). The question of whether Glickman actually saw Gottlieb testify in 1977 is a question of fact for the jury. Even if Glickman did see Gottlieb testify, the question of whether Glickman should have reasonably been able to connect Gottlieb to the clubfooted man who gave him the LSD-laced drink twenty-five years earlier is also a question for the jury. In sum, Glickman's Bivens claims are untimely insofar as he alleges that Helms and Gottlieb were in charge of the CIA program that led to his being unwittingly drugged with LSD. [FN9] But his Bivens claims are not untimely as a matter of law insofar as he alleges that Gottlieb himself was the man who administered the LSD in the Cafe Select in 1952. Whether Glickman should have been able, through the exercise of reasonable diligence, to make the connection between Gottlieb and the man in the cafe within the limitations period is a question that the jury must decide. [FN10]

> FN9. Apart from Glickman's primary claim that he was drugged at the Cafe Select by an agent of the United States government, who may have been Gottlieb himself, he also claims that he was administered electroshock treatment and additional hallucinatory drugs at the American Hospital of Paris. The suggestion is that this treatment was also part of the CIA's drug-testing program. In support of this argument, plaintiff introduced evidence that: (1) he had been treated at the hospital for hepatitis earlier

in 1952, and a CIA Information Report summarizing information acquired between November 1952 and September 1953 (which spans the time of Glickman's admission to the hospital) states that "[s]ubjects in whom even only a slight modification of hepatic function is present ... make a very marked response to LSD"; and (2) the psychiatrist who treated Glickman after the incident at the Cafe Select had published an article regarding his experiments with LSD on rabbits that was cited in CIA materials. Whatever else might be said about the merits of plaintiff's claim regarding his treatment at the American Hospital of Paris, this claim is part and parcel of plaintiff's more general (untimely) claim that he was the subject of a CIA experiment, and not his more specific (timely) claim that he was drugged by Gottlieb himself. In other words, this claim would have accrued when plaintiff first came to believe that he was a victim of CIA drug tests, and is therefore untimely.

FN10. It would not avail the plaintiff to argue that his putative inability to make this factual connection prior to April 1981 also tolls the accrual of his FTCA claim and his Bivens claims against Helms and Gottlieb arising from their roles in the CIA's LSD testing program. While Glickman's ability, as of April 1981, to potentially link Gottlieb to the man in the cafe strengthened all of Glickman's claims, his awareness of the existence of the FTCA claim and the broader Bivens claim--and hence the commencement of the limitations period for those claims--did not depend on his ability to identify Gottlieb as the possible direct perpetrator of the drugging. So long as a plaintiff has enough information to identify the basic facts giving rise to his claim, his ignorance of additional supportive facts does not postpone the very accrual of his claim.

B. The Merits--Genuine Issues of Material Fact

We review a district court's grant of summary judgment de novo. See Krumme v. *126 Westpoint Stevens Inc., 143 F.3d 71, 83-84 (2d Cir.1998). Summary judgment is appropriate only if, construing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact remains to be resolved by a jury. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party who will bear the burden of proof at trial must produce specific facts indicating that a genuine factual issue exists. See Scotto v. Arcadio Almenas, 143 F.3d 105, 114 (2d Cir.1998). However, "[w]e do not resolve disputed issues of fact but determine whether genuine issues of fact exist to be resolved at trial." Krumme, 143 F.3d 71, 83-84.

[14][15] A discussion of whether Glickman has produced sufficient evidence to survive summary judgment on his sole timely claim (his Bivens claim that Gottlieb was the person who laced his drink with LSD) must begin by focusing on the CIA's destruction of its MKULTRA files in 1973, at the direction of Gottlieb and with the approval of Helms. Although we believe, like the district court, that a jury might be skeptical of plaintiff's claim that he was drugged by Gottlieb, we also believe, contrary to the district court, that a jury should be

permitted (but not required) to draw an adverse inference against Gottlieb based on the destruction of MKULTRA documents. Further, we believe that, when combined with the possibility that a jury would choose to draw such an adverse inference, plaintiff's circumstantial evidence that he may have been one of the victims of the CIA's drug tests was enough-- barely enough, but enough nonetheless--to entitle him to proceed to trial.

[16] It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. See, e.g., Nation-Wide Check Corp. v. Forest Hills Distributors, 692 F.2d 214, 217-18 (1st Cir.1982); 2 John Henry Wigmore, Evidence in Trials at Common Law S 291 (James H. Chadbourn rev.1979). [FN11] This adverse inference rule is supported by evidentiary, prophylactic, punitive, and remedial rationales. The evidentiary rationale derives from the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction. The prophylactic and punitive rationales are based on the equally commonsensical proposition that the drawing of an adverse inference against parties who destroy evidence will deter such destruction, and

will properly "plac[e] the risk of an erroneous judgment on the party that wrongfully created the risk." Nation-Wide Check, 692 F.2d at 218. Finally, courts have recognized a remedial rationale for the adverse inference--namely, that an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party. See Skeete v. McKinsey & Co., No. 91 Civ. 8093, 1993 WL 256659, at *5 (S.D.N.Y. July 7, 1993); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y.1991).

> FN11. The principle that an adverse inference may be drawn against a party responsible for the loss or destruction of evidence is often associated with the famous common-law case of Armory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (K.B.1722), in which a chimney sweep who found a jewel sued a jeweler for the loss of the jewel, and was entitled, based on the jeweler's return of the ring without the stone, to an inference that the stone was "of the finest water." See Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir.1988); Nation-Wide Check, 692 F.2d at 218.

[17] [18] In order for an adverse inference to arise from the destruction of evidence, the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed. This obligation to preserve evidence arises when the party has notice that the evidence is relevant to

litigation--most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation. See Turner, 142 F.R.D. at 72-73; *127 Skeete, 1993 WL 256659, at *4. Once a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. See Weinreich v. Sandhaus, 850 F.Supp. 1169, 1181 n. 19 (S.D.N.Y.1994).

The district court properly rejected defendants' argument that an adverse inference was not warranted because at the time the MKULTRA documents were destroyed in 1973 no litigation, administrative action, or congressional investigation had commenced, and because Helms's and Gottlieb's reasons for destroying the evidence allegedly had nothing to do with the fear of future litigation. See Kronisch III, 1997 WL 907994, at *21. Although defendants claimed that the documents were destroyed to preserve the confidential identities of outside participants in the MKULTRA program, to prevent incomplete documents from being misunderstood, and to prevent paper overflow, the district court concluded that "[i]t is somewhat hard to believe that both

Gottlieb and Helms ... were concerned only with the effect of disclosure on other persons connected to the drug program, and not with the possible consequences to themselves or to the CIA." Kronisch III, 1997 WL 907994, at *22. Moreover, the district court observed, Gottlieb's own expressed fear that the documents might be "misunderstood" could be interpreted in a number of ways, including as a fear that the documents would become the subject of litigation. See id. At the very least, the district court could not rule out the possibility that a reasonable jury would find that Helms and Gottlieb feared the prospect of litigation against them individually, and that this prospect may have played a role in their decision to order the destruction of MKULTRA files. Inasmuch as the veracity of Gottlieb's stated reasons for destroying the MKULTRA documents "is an issue of credibility best left for trial," id., the district court presumed for purposes of considering the motion for summary judgment that defendants had an obligation to preserve the files and that the destruction was intentional, see id. Defendants do not challenge this sound approach on appeal.

Concluding (or, for purposes of summary judgment, assuming) that a party has intentionally destroyed evidence that it had an obligation to preserve is not the end of the story, however. We must also attempt to determine whether there is any likelihood that the destroyed evidence would have been of the

nature alleged by the party affected by its destruction. This inquiry is part of our attempt to place the innocent party in the same position he would have been in had the evidence not been destroyed by the offending party. The task is unavoidably imperfect, inasmuch as, in the absence of the destroyed evidence, we can only venture guesses with varying degrees of confidence as to what that missing evidence may have revealed. Nonetheless, before we permit the drawing of an adverse inference, we require some showing indicating that the destroyed evidence would have been relevant to the contested issue. See Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 923-24 (2d Cir.1981) (refusing to draw inference, based on nonproduction of personnel records, that the records would have substantiated plaintiff's age discrimination claim, where the nonproduction bore "no logical relationship to a finding of age discrimination" because "the documents [were] from a time period prior to [plaintiff]'s assumption of the position from which he was discharged"); Skeete, 1993 WL 256659, at *7 (refusing to draw adverse inference where party had "not demonstrated prejudice from the denial of access to the destroyed or lost materials" because it had "fail[ed] to provide any extrinsic evidence that the subject matter of the lost or destroyed materials would have been unfavorable to [the opposing party] or would have been relevant to the issues in this lawsuit"). Wigmore states the rule as follows:

> The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.
>
> *128 2 Wigmore, Evidence in Trials at Common Law S 291, at 228 (emphasis in original).

[19] Wigmore's description of the proper rule was offered in the context of a hypothetical in which a particular document (e.g., a deed meant to show the conveyance of a certain piece of land from X to Y), known by all to contain critical evidence in the case, was destroyed. Where, as here, a party loses the opportunity to identify such a particular document or documents likely to contain critical evidence because the voluminous files that might contain the document(s) have all been destroyed, the situation becomes more complex—but there can be no doubt that the same basic principle proposed by Wigmore still applies. That is, the prejudiced party may be permitted an inference in his favor so long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.

Just how much evidence is enough to support an inference about the content of destroyed evidence cannot be precisely defined, and will necessarily vary from case to case, but we remain mindful of Wigmore's admonition that "care should be taken" not to require too specific a level of proof. Id. at 228. Indeed, holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction. Certainly, the level of proof that will suffice to support an inference in favor of the innocent party on a particular issue must be less than the amount that would suffice to survive summary judgment on that issue. Otherwise, innocent parties meant to benefit from the adverse inference against offending parties would receive no benefit at all, having been deprived of evidence that may have been crucial to making their case, and yet being held to precisely the same standard of proof before they may present their case to a jury.

[20] We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has produced no evidence--or utterly inadequate evidence--in support of a given claim to survive summary judgment on that claim. See Nation-Wide Check, 692 F.2d at 218-19 ("The issue before the court was not whether the destruction

was sufficient, standing alone, to warrant an adverse inference about the documents' contents; it was simply whether the destruction was at all relevant to the tracing issue, and if so, whether it was sufficiently probative in conjunction with the other evidence to support the tracing conclusion."). But at the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line. In the absence of such a result, as noted above, the purposes of the adverse inference are eviscerated. Although we emphasize again that there are reasons to be skeptical of plaintiff's claim, we disagree with the district court's conclusion that plaintiff's evidence is so utterly insubstantial as to render an adverse inference unwarranted as a matter of law. We believe that plaintiff has produced enough circumstantial evidence to support the inference that the destroyed MKULTRA files may have contained documents supporting (or potentially proving) his claim, and that the possibility that a jury would choose to draw such an inference, combined with plaintiff's circumstantial evidence, is enough to entitle plaintiff to a jury trial.

We reiterate that, at the summary judgment stage, we are required to draw all factual inferences in Glickman's favor. Moreover, for purposes of this

summary judgment motion (only), defendants do not contest that Glickman was unwittingly drugged with LSD in a Paris cafe in 1952. See Kronisch III, 1997 WL 907994, at *20. Although at trial Gottlieb might be able to offer explanations for the events in Glickman's life beginning in October 1952, and might be able to discredit the conclusion of plaintiff's expert that these events are explained by Glickman's unwitting consumption of LSD, defendants have not yet attempted to do so. Defendants likewise do not contest ***129** at this stage that Glickman was given the LSD-laced drink by an American with a clubfoot--a distinguishing characteristic possessed by Gottlieb, the head of the MKULTRA program. See id. The allegation that the man who gave Glickman the drink was clubfooted is also one that might be attacked by Gottlieb at trial. Glickman claims to have only remembered this distinguishing characteristic some twenty-nine years after the fact when his friend Dean Corren, upon Corren's return from Washington after viewing CIA files in 1981, asked him whether the man who gave him the drink in 1952 was clubfooted. Glickman's recollection in response to his friend's suggestive question will doubtless be challenged at trial. However, whatever doubts Gottlieb might reasonably be able to create in the minds of a jury as to the credibility of this recollection are not doubts that we may now entertain, inasmuch as we are reviewing the grant of a motion for summary judgment.

Accordingly, we must accept as true for purposes of reviewing the district court's decision on this motion that Glickman was given LSD by an American with a clubfoot in 1952. Plaintiff has produced evidence that the pool of Americans who would have had access to LSD at the relevant time--not to mention the subset of all such individuals also having a clubfoot--was quite limited, inasmuch as "LSD was known only to a few researchers and government agents" in 1952. Report of Dr. Lester Grinspoon, Associate Professor of Psychiatry, Harvard Medical School, at 8 (May 3, 1988). Moreover, as the district court recognized, "it appears that the CIA, and specifically Gottlieb, was engaged in some form of LSD research in 1952." Kronisch III, 1997 WL 907994, at *20. In conducting LSD tests on unwitting victims within the United States, the CIA at times would make contact with the subject in a bar or other public place, and administer the drug by slipping it into the person's drink--a scenario like the one allegedly experienced by Glickman. See Kronisch III, 1997 WL 907994, at *6, *20. Apart from the domestic testing of LSD on unwitting subjects, MKULTRA materials were used abroad on a number of occasions, "possibly as early as 1950." Church Committee Report at 391. Although there is no direct evidence that any overseas tests were conducted in Paris or on American subjects in non-interrogational settings, and although Gottlieb testified at his deposition that his only overseas use of LSD involved three interrogations of foreign

nationals after 1952 in places other than France, the destruction of MKULTRA files has made it "impossible to reconstruct the operational use of MKULTRA materials by the CIA overseas," id., and thereby, perhaps to contradict Gottlieb's assertions.

In sum, while plaintiff's chain of circumstantial evidence may prove to be altogether vulnerable at trial, it is sufficient to suggest the reasonable possibility that, had Gottlieb and Helms not ordered the destruction of the MKULTRA files, these files may have contained evidence helping to substantiate plaintiff's claim that Gottlieb drugged him in Paris in 1952. Accepting, as the current record requires on defendants' motion for summary judgment, that very few Americans--other than those working with the CIA--knew of or had access to LSD in 1952; that Gottlieb was engaged in some form of LSD research in 1952; that the CIA performed LSD tests on unwitting subjects in the United States at or near the relevant time; that the CIA drug tests were at times performed using the same means alleged here; that the CIA tested LSD abroad, albeit under different conditions and circumstances; and that the man who gave Glickman the drink, like Gottlieb, had the distinguishing trait of a clubfoot, we cannot say that it is so unlikely that the destroyed MKULTRA files would have contained evidence buttressing plaintiff's claim that an adverse inference is

unwarranted as a matter of law. [FN12] Although plaintiff has not *130 produced direct proof that the CIA conducted LSD tests in Paris, or that the overseas use of LSD involved tests on Americans (rather than foreign nationals) in non-interrogational settings, the most obvious source of such proof, if it were to exist at all, has been destroyed at Gottlieb's direction. Under these circumstances, requiring more direct proof than plaintiff has provided before permitting an adverse inference to be drawn against Gottlieb would be at odds with the purposes of the adverse inference rule.

FN12. Plaintiff has also offered evidence that Gottlieb met with George White--the Bureau of Narcotics Agent who administered LSD to unwitting subjects in New York City--on October 20, 1952 (in New York), and then again in Washington, D.C. on October 30, 1952. Plaintiff argues that there is therefore a window within the relevant time period (Glickman's admission to the American Hospital of Paris on November 11, 1952 occurred approximately two weeks or so after the alleged incident at the Cafe Select, suggesting that the incident would have occurred in the vicinity of the last week of October) during which Gottlieb could have been in Paris. See Kronisch III, 1997 WL 907994, at *20 n. 19. Although, of course, it is not defendants' burden to prove a negative, we note that CIA Agent Frank H. Laubinger testified in his deposition that he recalled either preparing or helping to prepare a memorandum that would have reflected all international travel by Gottlieb in 1952--and no such document has been forthcoming from defendants in response to plaintiff's specific document request.

Assuming that a jury were to find that Gottlieb had an obligation to preserve the MKULTRA documents that he ordered to be destroyed, the jury would be entitled to draw an adverse inference against Gottlieb. The possibility that the jury would choose to draw such an inference, along with plaintiff's other circumstantial evidence that he was drugged by the CIA--specifically, by Gottlieb--is enough to entitle plaintiff to a jury trial.

C. Personal Jurisdiction

[21] The district court concluded that it lacked personal jurisdiction over both Helms and Gottlieb. Inasmuch as we have already concluded that the claims against Helms are untimely, we have no need to consider plaintiff's challenges to the district court's conclusion with respect to Helms. However, we disagree with the district court's conclusion that it lacked personal jurisdiction over Gottlieb.

[22] [23] "Personal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits--subject, of course, to certain constitutional limitations of due process." Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir.1994). Under the relevant portions of New York's long-arm statute, personal jurisdiction may be asserted over a non-domiciliary who, in person or through an agent,

"transacts any business within the state." N.Y.C.P.L.R. S 302(a)(1) (McKinney's 1990). Where, as here, the district court decides a pretrial motion to dismiss for lack of personal jurisdiction on the basis of the written record, without holding an evidentiary hearing, the plaintiff "'need only make a prima facie showing of jurisdiction through its own affidavits and supporting materials' " to defeat the motion. Welinsky v. Resort of the World D.N.V., 839 F.2d 928, 930 (2d Cir.1988) (quoting Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir.1981)).

[24] [25] We are persuaded that Glickman has made a prima facie showing of personal jurisdiction over Gottlieb under the "transacting business" provision of N.Y.C.P.L.R. S 302(a)(1). Under this provision, plaintiff must show that Gottlieb "purposefully avail[ed] himself of the privilege of conducting activities within New York" such that bringing Gottlieb before a New York court does not offend due process, and that plaintiff's cause of action "ar[o]se out of" those activities in New York. CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir.1986) (internal punctuation omitted); see Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 N.Y.S.2d 195, 198-99, 522 N.E.2d 40 (1988); McGowan v. Smith, 52 N.Y.2d 268, 437 N.Y.S.2d 643, 644- 45, 419 N.E.2d 321 (1981). In order for a cause of action to "arise out of" a party's activities in New York, there must be "an articulable nexus,"

or a "substantial relationship," between the claim asserted and the actions that occurred in New York. See Kreutter, 527 N.Y.S.2d at 198-99, 522 N.E.2d 40; McGowan, 437 N.Y.S.2d at 645, 419 N.E.2d 321.

Gottlieb admits that he made approximately six trips to New York in 1952, and that he "visited George White on two or three occasions in 1952 to discuss his becoming a consultant for the CIA in LSD research." Gottlieb Declaration P 4. White, a Bureau of Narcotics Agent, conducted LSD tests on unsuspecting persons in New York, including one experiment in which he gave LSD to a group of his friends in his New York apartment *131 in November 1952. The record also reflects that beginning in June 1953, White covertly administered LSD to people in New York with whom he came into contact in his role as a narcotics agent. Gottlieb testified before the Kennedy Committee that White may have conducted his tests on one or more occasions by administering the drug to an unsuspecting person in a bar.

Apart from his contacts with White, Gottlieb also declared that he may have visited Dr. Harold Abramson, a physician who later became an MKULTRA consultant, in New York in 1952. See Gottlieb Declaration P4. According to Gottlieb, "Dr. Abramson may have been engaged in LSD research in 1952 sponsored by TSD, or in which

TSD was interested, and if so, I would have had contacts with him about the progress of his research." Id. White and Abramson, in Gottlieb's words, "regularly reported the[ ] results" of their research to him. Id. Finally, Gottlieb and others within TSD self-administered LSD during 1951-1953, and Gottlieb "believe[s] that one or more of these administrations took place in a New York City hotel room and ... that Dr. Abramson may have been present during one of these administrations," although he could "not recall specifically if any self-administrations took place in New York in 1952." Id. P 5.

We believe that these contacts with New York are sufficient to establish a prima facie showing of personal jurisdiction over Gottlieb inasmuch as Gottlieb's activities in New York were aimed at laying the groundwork for the LSD testing program of which Glickman claims to have been one of the unwitting victims. Apart from Gottlieb's contacts with Dr. Abramson, and his self- administration of LSD with other TSD officials--both of which bear some relationship to the development of the CIA's LSD testing program, and hence to Glickman's allegation that he was a victim of this program--Gottlieb's New York contacts with George White are particularly significant. White's project was aimed at the administration of LSD to totally unwitting persons, and may have included, according to Gottlieb's testimony before the

Kennedy Committee, administration to an unwitting person in a New York bar on one or more occasions. In the words of the Church Committee Report, the administration of LSD to "unwitting nonvolunteer subjects in normal life settings by undercover officers of the Bureau of Narcotics" was important to the CIA because the "testing of materials under accepted scientific procedures fails to disclose the full pattern of reactions and attributions that may occur in operational situations." Church Committee Report at 391 (internal quotation marks and citation omitted). Accordingly, the fact that Gottlieb was working with White in New York in the latter part of 1952 is significant, for purposes of establishing a nexus to Gottlieb's alleged drugging of Glickman in Paris in October 1952, not only because White was experimenting with LSD, but because White was retained by Gottlieb, in part, for the purpose of performing the very type of "normal life setting" LSD experiment that Glickman claims to have experienced. [FN13]

FN13. As described supra, note 12, the alleged incident at the Cafe Select occurred somewhere in the vicinity of the last week of October 1952. Assuming that a jury were to credit Glickman's account, the fact that Gottlieb met with White in New York on October 20, 1952, and in Washington on October 30, 1952, would only strengthen the nexus between plaintiff's claim and Gottlieb's work with White in New York.

In short, we believe that Gottlieb's alleged drugging of Glickman in Paris is sufficiently related to Gottlieb's work in New York to satisfy plaintiff's prima facie showing of long-arm jurisdiction over Gottlieb under N.Y.C.P.L.R. S 302(a)(1).

III.

In sum:

(1) We affirm the dismissal of Glickman's FTCA claims against the United States as untimely under the applicable two-year statute of limitations;

(2) We affirm the dismissal of Glickman's Bivens claims against Gottlieb and Helms as untimely under the applicable three-year statute of limitations insofar as these claims allege that Gottlieb and Helms administered a program of LSD testing on unwitting subjects *132 that included Glickman among its victims;

(3) We vacate the dismissal for untimeliness of Glickman's Bivens claim against Gottlieb insofar as Glickman alleges that Gottlieb himself was the person who administered the LSD-laced drink;

(4) Assuming that a jury were to find that Gottlieb had an obligation to preserve the MKULTRA documents that he ordered to be destroyed, the jury would be permitted (but not required) to draw an

adverse inference against Gottlieb to the effect that the destroyed documents would have contained evidence supportive of Glickman's claim. The possibility that a jury would choose to draw such an inference, combined with plaintiff's other circumstantial evidence of liability, is sufficient to allow plaintiff to survive defendants' motion for summary judgment;

(5) The district court has personal jurisdiction over Gottlieb under N.Y.C.P.L.R. S 302(a)(1);

(6) We have considered all of the parties' other arguments, and find them to be without merit.

The judgment of the district court is affirmed in part and vacated in part as noted above, and the case is remanded to the district court for further proceedings consistent with this opinion, which proceedings are to be limited to the Bivens claim that Gottlieb himself administered the LSD-laced drink to plaintiff in Paris in October 1952. Each party shall bear its own costs.

APPENDIX E

United States District Court, S.D. New York.

Gloria KRONISCH, Executrix of the Estate of Stanley Milton Glickman, Plaintiff,
v.
UNITED STATES OF AMERICA; Sidney Gottlieb, in his individual and in his official capacities; Richard Helms, in his individual and in his official capacities; and John Does, Unknown Agents of the Central Intelligence Agency; Defendants.

No. 83 Civ. 2458(KMW).

April 14, 1997.

Sidney Bender, Leventritt Lewittes & Bender, New York City, Nancy G. Milburn, Assistant United States Attorney, New York City.

ORDER

WOOD, J.

*1 This action, commenced in 1983, is based upon Stanley Milton Glickman's ("Glickman" or "plaintiff") allegations that in 1952, in Paris, defendant Sidney Gottlieb ("Gottlieb") gave

Glickman a drink laced with lysergic acid diethylamide ("LSD"), as part of a practice of defendant the Central Intelligence Agency (the "CIA") to conduct drug experimentation and testing on unwitting subjects in the 1950s. [FN1] In April 1996, defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56(b). Plaintiff opposed the motion, and cross-moved for an order pursuant to Fed.R.Civ.P. 56(d) specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just.

> FN1. Because Glickman is now deceased, his sister, Gloria Kronisch ("Kronisch"), has continued to prosecute the action on behalf of Glickman's estate. Notwithstanding that change, this order refers to Glickman, rather than Kronisch, as plaintiff.

On August 30, 1996, Magistrate Judge Naomi Reice Buchwald issued a Report and Recommendation (the "Report") in this action. In the Report, which is attached to this order, Magistrate Judge Buchwald recommended that I grant defendants' motion and deny plaintiff's motion. Plaintiffs submitted objections to the Report on September 27, 1996; defendants responded to those objections on October 17, 1996. Plaintiff offered a reply to defendants' response on October 23, 1996. Because the Report makes a recommendation with respect to a dispositive motion, I review the Report de novo under 28 U.S.C. S 636(b).

I. Analysis

In the Report, with which the Court assumes complete familiarity, Magistrate Judge Buchwald recommended that I grant summary judgment in favor of the defendants for numerous reasons. Specifically, Magistrate Judge Buchwald determined that: (1) plaintiff's claim against defendant the United States was untimely under the Federal Tort Claims Act (the "FTCA"); (2) plaintiff's claims against individual defendants Gottlieb and Richard Helms ("Helms"), brought pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), were untimely; (3) the Court lacks subject matter over claims against Gottlieb and Helms in their official capacities; (4) the Court lacks personal jurisdiction over both Gottlieb and Helms; (5) plaintiff has failed to show a genuine issue of material fact with respect to the merits of the action.

Magistrate Judge Buchwald first examined whether plaintiff's claims were time- barred. The FTCA provides a two-year statute of limitations for torts committed by the federal government. 28 U.S.C. S 2401(b). As Magistrate Judge Buchwald noted, although accrual of an FTCA claim generally accrues at the time of injury, see Kubrick v. United States, 444 U.S. 111, 120, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), accrual may be postponed

"until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." Barrett v. United States, 689 F.2d 324, 326 (2d Cir.1982) (citations omitted), cert. denied, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983). In Guccione v. United States, upon which the Report also relies, the district court explained that possession of the critical facts "means knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it." Guccione, 670 F.Supp. 527, 536 (S.D.N.Y.1987), aff'd on other grounds, 847 F.2d 1031 (2d Cir.1988).

*2 Plaintiff argues that the Report erred in relying on Guccione rather than Barrett. However, the Report based its conclusion on both holdings. Report at 18-21, 26-27. The two holdings are not inconsistent with one another; rather, they address different aspects of the accrual problem. Magistrate Judge Buchwald correctly relied on both opinions in her Report.

As the Report stated, the parties to this action dispute the date when the plaintiff knew, or should have known, the critical facts of both his injury and its causes. Plaintiff filed an administrative claim with the CIA on December 22, 1981. Therefore, in order to be timely, the date of accrual must have been no earlier than December 22, 1979.

It is undisputed that plaintiff formed a belief, as early as 1977, that he had been drugged by the CIA. Report at 24. In 1977, he wrote to the United States Attorney General stating his belief that he was unwittingly involved in CIA drug experiments, and also made a freedom of information request to the CIA, seeking all files maintained under his name and any documents containing his name. In addition, in the fall of 1977 and in January of 1978, plaintiff wrote two letters to Senator Edward Kennedy, who was then presiding over the Kennedy Committee hearings on human drug testing by the CIA, stating his belief that he had been a victim of such testing.

Magistrate Judge Buchwald concluded that the knowledge plaintiff had in 1977 and early 1978 constituted knowledge of the critical facts in his case, and that plaintiff's claim therefore accrued, at the latest, in January 1978. Notwithstanding plaintiff's objections to the contrary, I agree with Magistrate Judge Buchwald's conclusion. In this action, the accrual issue is somewhat obscured by the fact that plaintiff's evidence regarding causation--that is, evidence tying the CIA, Gottlieb, and Helms to the incident in Paris in which Glickman allegedly was given LSD--is, as Magistrate Judge Buchwald noted, "a dizzying series of conjectures and speculations dressed up to look like reasonable inferences." Report at 40. In essence, plaintiff now argues that because

Magistrate Judge Buchwald could conclude, in 1996, that plaintiff has no concrete evidence linking the CIA to his claimed injury, his cause of action could not possibly have accrued in 1978 or 1979, when plaintiff had no concrete evidence linking the CIA to his claimed injury. Taking this argument to its logical conclusion, plaintiff's cause of action has yet to accrue. However, under the relevant case law of Guccione and Barrett, discussed above, plaintiff's action has accrued. The mere fact that plaintiff (or his estate) knows little more now regarding defendants' role in causing his injury than he knew in 1978 does not indicate that plaintiff's claim is not time-barred; rather, it points to the significant defect of plaintiff's case on its merits--namely, plaintiff's inability to demonstrate sufficient facts that would lead to an inference of causation by defendants of an injury to plaintiff.

*3 In addition, Magistrate Judge Buchwald determined that plaintiff's Bivens actions against Helms and Gottlieb are time-barred for similar reasons. In New York, those actions are governed by a three-year statute of limitations. Chin v. Bowen, 833 F.2d 21, 23-24 (2d Cir.1987). Therefore Magistrate Judge Buchwald correctly concluded that they are time-barred because they were not filed within three years after January 1978, the latest date when plaintiff's claim could have accrued under federal law. See, e.g., Veal v.

Geraci, 23 F.3d 722, 724 (2d Cir.1994) (citations omitted).

I find plaintiff's objections to the remainder of the Report without merit. Accordingly, I hereby adopt in whole the analysis and conclusions of Magistrate Judge Buchwald's carefully reasoned and thoughtful Report, including her conclusion that summary judgment for defendants is warranted on the merits of this action. I therefore grant defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56(b) in its entirety, and deny plaintiff's motion for an order pursuant to Fed.R.Civ.P. 56(d) specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just. I therefore order the Clerk of Court to close this case.

SO ORDERED: April 14, 1997 Kimba M. Wood
U.S.D.J.

REPORT AND RECOMMENDATION

During the 1950s, the Central Intelligence Agency ("CIA") sponsored secret projects to test human responsiveness to certain mind-altering drugs such as lysergic acid diethylamide ("LSD"). The CIA experiments included administration of LSD to totally unwitting American citizens. In this lawsuit, commenced in 1983, plaintiff Gloria Kronisch alleges that her now-deceased brother, Stanley Glickman, was the victim of one such experiment.

The Amended Complaint states multiple causes of action against defendant United States of America pursuant to the Federal Torts Claim Act, 28 U.S.C. S 2671 ("FTCA"), and against defendants Sidney Gottlieb and Richard Helms, in their individual capacities and in their official capacities as former employees of the CIA, pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Specifically, plaintiff asserts common law tort claims of negligence, invasion of privacy, and intentional infliction of emotional distress against the United States and claims under the First, Fourth, Fifth, and Eighth Amendments against the individual defendants.

By Notice of Motion dated April 26, 1996, defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56(b). [FN1] In arguing that summary judgment is inappropriate, plaintiff has cross-moved for an order pursuant to Fed.R.Civ.P. 56(d) specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just. For the reasons discussed below, we respectfully recommend that defendants' motion be granted and plaintiff's motion be denied.

FN1. By Order dated May 7, 1992, this matter was referred to me for general pretrial purposes, including a Report and Recommendation on dispositive motions.

FACTS [FN2]

FN2. We note that for some reason plaintiff chose not to offer a statement of facts in its memorandum of law. In addition, its statement pursuant to Local Rule 3(g) is almost completely devoid of citations to the record.

I. Glickman's Personal History

*4 In October 1952, Stanley Milton Glickman was pursuing a promising career as an artist in Paris, having had one of his works accepted for exhibition at the Metropolitan Museum of Art in New York City. (Glickman Aff. PP 6--8; Am.Compl. PP 15-16. [FN3]) One evening after he had finished his day's work, Glickman arrived at a cafe he frequented and was approached by an acquaintance, who wanted him to meet some American friends across the street at the Cafe Select. (Glickman Aff. PP 10-11; Am.Compl. P 17.) Glickman met the American men at their table and then engaged in "several hours of hostile debate," focusing on "power, patriotism, and changing the world to conform with their personal beliefs." (Glickman Aff. P 11.) When Glickman prepared to leave, the "chief protagonist" among the Americans offered him a drink as a conciliatory gesture. Glickman initially declined but yielded after the man persisted through "obnoxious pressure." (Id. P 12; Am.Compl. P 18.) Rather than call over the waiter, the man walked to the bar to get the drink. (Id.)

Plaintiff observed that the man had a clubfoot. (Glickman Dep. at 196; Original Glickman Aff. P 31. [FN4]) Halfway through the drink, Glickman "began to experience a lengthening of distance and a distortion of [his] perception," and he noticed that "[t]he faces of the gentlemen flushed with excitement as they watched the execution of the drink." (Glickman Aff. P 13.) The man with the clubfoot steered the conversation to "the working of miracles" and suggested that Glickman "surely [ ] would be capable of this power." (Id.) Glickman declined, then emptied his glass and said good night. (Id.) He then experienced colors and lights that had "changed" and "distant figures following [his] difficult path home." (Id.) He believed that he had been poisoned, and awoke the next morning "hallucinating intensely." (Id.) Glickman states that "the effects of the drink would today be described as a classic L.S.D. experience." (Id.)

FN3. Glickman's affidavit, dated August 20, 1983, and the Amended Complaint are attached as Exhibits 40 and 41, respectively, to the Declaration of Nancy G. Milburn, executed April 26, 1996 ("Milburn Decl.").

FN4. Portions of Glickman's deposition are attached as Milburn Decl.Ex. 42 and, in plaintiff's papers, as Bender Decl.Exs. 6-7. "Original Glickman Aff." refers to an earlier, undated affidavit that Glickman attached to the final version and upon which the final version is based. (See Glickman Aff. P 32.)

Over the next two weeks, Glickman "wandered in the pain of madness, delusion and terror," ultimately returning to the Cafe Select and deliberately closing his eyes to "wait for 'someone' to come and tell me what had happened." (Id. P 16.) With his eyes remaining closed, Glickman was carried from the cafe, placed in an automobile and taken to the American Hospital in Paris on November 11, 1952. (Id. P 17.) After two brief stays in the hospital, during which he claims he was administered electroshock via catheter and "large doses" of "hallucinatory drugs," a friend helped him sign out of the hospital and return to his studio. (Id. PP 17-19.) Over the next ten months Glickman remained mostly in his studio with his continuing "madness," experiencing "stress, terror, hallucination and difficulty eating." (Id. P 20.) Glickman's family helped him to return to the United States in July 1953. (Id. P 21.)

*5 After returning to this country, Glickman was cared for by family members and doctors to the extent that his physical condition but not his mental condition was improved. (Id. PP 22-23.) During the next twenty-five years of his life, Glickman gradually became "functional" and held various jobs, but he never painted again and was unable to maintain any normal social life. (Id. PP 26-27.)

II. The CIA Drug Programs

A. BLUEBIRD/ARTICHOKE Projects

Defendants' memorandum provides a highly detailed description of some of the American intelligence community's initiatives involving the experimentation with and use of drugs such as LSD. The most relevant highlights are presented here.

The earliest of the CIA's major drug programs, known as project BLUEBIRD, was approved by the Director of Central Intelligence ("DCI") in 1950 in response to intelligence reports that communist countries were using biological and chemical agents to interrogate and brainwash American intelligence personnel. (Church Report at 387, 392. [FN5]) "Of particular concern was the drug LSD." (Id. at 392.) The objectives of project BLUEBIRD were to discover means to insulate CIA personnel from "hostile control" or from "unauthorized extraction of information ... by known means," and to investigate the possibility of controlling individuals "by application of special interrogation techniques." (Id. at 387.)

FN5. The "Church Report" refers to the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, published in 1976 and attached as Milburn Decl.Ex. 1. See S.Rep. No. 755, 94th Cong., 2d Sess. 385-422 (1976.) The Committee, chaired by Senator Frank Church, began hearing testimony in 1975. (See McGinn Decl. P 5.)

After being renamed ARTICHOKE in August 1951, the project added the goal of evaluating offensive uses of interrogation techniques "including hypnosis and drugs." (Id.) By 1952, having moved away from a focus on intelligence- gathering, the project became more operational in nature. (Id. at 387-88.) The project included both in-house experiments, conducted under "medical and security controls," and overseas interrogations utilizing a combination of truth serums, hypnosis, and polygraph tests. (Id. at 377-78; Milburn Decl. Exs. 4-8.) The overseas experimentations involved the administration of these "techniques" to foreign nationals who were known or suspected foreign intelligence agents, defectors, and double agents, (see Milburn Decl. Exs. 4- 8), but they also may have involved testing on subjects not suspected of espionage or wrongdoing, (see id. Ex. 7.) In addition, during two trips made overseas by ARTICHOKE teams to conduct interrogations, "new drugs" identified as seconal, dexedrine, and marijuana were administered to subjects. (Id. Exs. 5, 10.) The ARTICHOKE interrogations were apparently all conducted in "safehouses" or other unidentified

secure locations, where the subjects were closely observed by professionally and clinically trained individuals. (Id. Exs. 5, 11-12.) Sometimes the drugs were surreptitiously placed in the subject's coffee or beer. (Id. Exs. 5, 10.) Despite the use of truth serums and other drugs in its experiments, defendants claim that project ARTICHOKE did not involve the use of hallucinogenic drugs, and the documents in the record do not suggest otherwise. (See Gottlieb Dep. at 187, 300, 485-86; Laubinger Dep. at 57, 138-39. [FN6] Further, none of the BLUEBIRD/ARTICHOKE documents mention administration of any drugs or electroshock treatment to any person in France or to any American overseas. (See, e.g., Milburn Decl. Exs. 5-7, 11, 18- 20.)

FN6. Portions of the deposition of Sidney Gottlieb, taken September 19, 1995, are attached as Milburn Decl. Ex. 9 and, in plaintiff's papers, as Bender Decl. Ex. 10. Portions of the deposition of Frank Laubinger, taken November 5, 1987, are attached as Milburn Decl. Ex. 15 and as Bender Decl. Ex. 14.

*6 The CIA maintains that project ARTICHOKE was the only formal agency drug program in existence in October 1952. Defendants also state that CIA personnel working on project ARTICHOKE shared information with defendant Sidney Gottlieb and other representatives of the Technical Services Division ("TSD"), [FN7] but that TSD did not itself engage in ARTICHOKE

work. (Milburn Decl. Exs. 13- 14; Gottlieb Dep. at 281-282.) It appears, however, that prior to 1953 TSD and Gottlieb were involved in some form of LSD research. (See Milburn Decl. Exs. 13, 24-26; Laubinger Dep. at 139-40.) While conceding that "from the time of its discovery, LSD was of intense interest to TSD," defendants state that no evidence suggests that TSD funded or engaged in LSD testing or research overseas, or prior to April 1953 ever funded or engaged in LSD testing on unwitting persons, with the "possible exception" of George White's administration of LSD to his friends. [FN8] (Def.'s Mem. Supp. Summ. J. at 12 n. 5.)

FN7. TSD (formerly "TSS") was a technical research division of the CIA which provided technical support and assistance to the agency's clandestine operations. (Gottlieb Dep. at 270.) Gottlieb had joined the CIA in 1951 as the person in charge of "conventional use of chemistry in espionage." (Id. at 10, 13-14.)

FN8. Gottlieb met with White, a/k/a Morgan Hall, two or three times in New York City in 1952 (the first time was apparently in June) to discuss his becoming a consultant for the CIA in LSD research. (Gottlieb Decl. P 4; Milburn Decl. Ex. 63.) White may have administered LSD to unsuspecting friends in his apartment in November 1952, but White's official CIA work, performed as subprojects of the MKULTRA program (see infra), did not begin until June 1953, when he set up a safehouse in New York City at which he tested the effects of LSD on unwitting subjects (typically prostitutes and drug informants) he had met in connection with his work for the Bureau of Narcotics. (See Milburn Decl. Ex.

27, at 171; id. Ex. 63; Gottlieb Dep. at 595.) Additionally, Gottlieb has stated that, during the subprojects, White may have administered LSD to persons in New York City bars. (Gottlieb Dep. at 596-600; Milburn Decl. Ex. 207 at 204.)

B. MKULTRA Program

The MKULTRA program began as a proposal to the DCI from the CIA's Assistant Deputy Director for Plans, Richard Helms. [FN9] (Church Report at 389.) Gottlieb then Chief of the Chemical Division of TSD, was put in charge of planning and organizing MKULTRA in 1952. (Gottlieb Decl. P 3.) Although the MKULTRA research program was "actively underway since the middle of 1952," (Milburn Decl. Ex. 28 [internal CIA memorandum dated April 3, 1953]), the program was not formally approved by the DCI until April 13, 1953, (Church Report at 389). MKULTRA was the principal CIA program involving the research and development of chemical and biological agents and was concerned primarily with making these agents capable of use in clandestine operations to control human behavior. (Id.) The program consisted of 149 subprojects which were conducted through "standing arrangements" with specialists in universities, pharmaceutical houses, hospitals, and public and private institutions. (Church Report at 390-91; Milburn Decl. Ex. 28, at 10.)

FN9. During the first six months of 1952, Helms was Chief of the Foreign Intelligence Staff of the Office of the Deputy Director for Plans ("DDP"). (Helms Decl. P 3.) In the summer of 1952, he became Chief of Operations within the DDP. (Id.) His duties in both positions "consisted of overseeing CIA covert action and clandestine activities overseas." (Id.) Besides initially proposing MKULTRA to the DCI, Helms approved funding requests for the program on an annual basis and was kept apprised of the research. (Id. P 4; Helms Dep. at 174, 206.) Helms testified that he had no responsibility over the earlier BLUEBIRD/ARTICHOKE projects. (Helms Dep. at 185-86.)

LSD was one of the materials used in the MKULTRA program. (Church Report at 391.) According to the Church Report, the "final phase of LSD testing involved surreptitious administration to unwitting nonvolunteer subjects in normal life settings by undercover officers of the Bureau of Narcotics acting for the CIA." (Id. at 391, 393.) Such testing was in fact performed on a variety of individuals, some of them native-born Americans, at all different social levels, in the United States. (Id.) According to author John Marks, TSD operatives slipped LSD to unsuspecting citizens "in public places like restaurants, bars, and beaches ... while buying them a drink or lighting up a cigarette, and they then tried to observe the effects." [FN10]

FN10. See John Marks, The Search for the Manchurian Candidate 97. Neither party appears to have included excerpts from this book. The quotation appears in plaintiff's memorandum at pages 17-18.

It is not disputed that surreptitious testing also occurred abroad "on a number of occasions." (Id. at 391). TSD conducted at least some of these operations. (Id. at 394.) However, the Church Report's description of overseas use refers only to operational testing on "foreign nationals" who were being interrogated as "prisoners of foreign intelligence or security organizations," and does not indicate that any overseas research testing occurred, much less in uncontrolled settings or on American citizens. (Id. at 400-01.) Because MKULTRA records were destroyed (see infra), the operational use (or, hypothetically, research testing) of MKULTRA materials overseas has never been fully reconstructed, although the Church Report indicates that overseas operational use "began in 1953, and possibly as early as 1950." (Id. at 391; see id. at 399.)

*7 Gottlieb does not deny his substantial role in overseas operational use of LSD from 1953 on, which included trips to the interrogation sites, direct supervision of the administration of the drug, and observation of the effects. (Gottlieb Dep. at 249, 306, 362-63, 368, 371, 376, 385-86.) However, Gottlieb does deny that any overseas research testing (as opposed to operational use) of LSD on

unwitting subjects occurred between 1951 and 1957, and that either he or another person by his direction ever administered LSD to anyone in France. [FN11] (Id. at 396-98, 424, 711-13.) In this connection, Gottlieb testified that he obtained his first passport in 1953 in anticipation of a trip to the Far East for an MKULTRA operation, and that he traveled to Paris for the first time in 1958 when he visited the city with his wife. (Id. at 29-30, 554-55, 557-58.)

> FN11. A former CIA employee, who was stationed in France from 1952 through 1955, states in a confidential affidavit that "[t]he CIA definitely had a presence in Paris, France in 1952." (Bender Decl. Ex. 4 [filed under seal].) The affidavit does not refer to drug testing.

C. Destruction and Recovery of MKULTRA Files

In January 1973, MKULTRA records were destroyed by TSD personnel acting on the verbal orders of defendant Gottlieb, Chief of TSD, who had obtained verbal approval for the destruction from defendant Helms, then the Director of Central Intelligence. (Church Report at 389; Gottlieb Dep. at 206, 613; Milburn Decl. Ex. 27 at 195-96. [FN12]) Gottlieb has testified that the destruction of records occurred as part of his systematic effort, in anticipation of his retirement, to throw out old files and papers that would be "superfluous and not useful" to his successors. (Milburn Decl. Ex. 27 at

195.) He testified that he sought to destroy the drug files in particular for three reasons: (1) as a response to pressure from "a continuing an important CIA program of files destruction to handle a burgeoning paper problem"; (2) a fear that, given the retirement of people connected to the now terminated drug work, these "sensitive files" were "capable of being misunderstood by anyone not thoroughly familiar with their background"; and (3) in order to protect the confidentiality of prominent scientists, physicians, and others who collaborated with the CIA and who would otherwise face severe damage to their careers and reputations. (Id.; see Gottlieb Dep. at 207-08, 614-17.) Helms claims he gave his approval to the destruction of the drug files because he too was concerned that outside researchers who had collaborated on the program could be subject to embarrassment and reputational damage if their identities were disclosed. (Church Report at 403-04; Helms Dep. at 277-79. [FN13]) Both Helms and Gottlieb claim that they were not motivated to destroy the files out of any concern that they might one day be named defendants in a lawsuit brought by the unwitting subjects of CIA drug testing. (Helms Dep. at 281-82; Gottlieb Dep. at 605.) In this regard defendants assert that no lawsuits or administrative tort claims were filed with respect to any aspect of the CIA's drug testing programs until 1975, and that no investigative body had expressed interest in MKULTRA other than the Inspector

General, which investigated MKULTRA in 1963. (McGinn Decl. PP 3, 5.)

FN12. Exhibit 27 includes Gottlieb's testimony before the United States Senate in September 1977. See Human Drug Testing by the CIA, 1977: Hearings on S.1893 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 169-205 (1977) (statement and testimony of Sidney Gottlieb, M.D.). The subcommittee, chaired by Senator Edward Kennedy, will be referred to hereinafter as the "Kennedy Committee."

FN13. Portions of the deposition of Richard Helms, taken August 7, 1995 are attached as Milburn Decl. Ex. 29 and, in plaintiff's papers, as Bender Decl. Ex. 12.

*8 The files destroyed in 1973 were "substantive" MKULTRA documents, i.e., files that detailed the "content of the project." (Gottlieb Dep. at 208.) The Church Committee stated that the destruction of documents had "made it impossible ... to determine the full range and extent of the largest CIA research program involving chemical and biological agents." (Church Report at 404.) Moreover, it "prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program." (Id.) However, many financial documents connected to MKULTRA, some of which referred to substantive aspects of the program, escaped destruction and were found by a CIA employee in 1977. (Gottlieb Dep. at 208;

Milburn Decl. Ex. 28 at 4-5. [FN14]) The recovered documents provided the Senate committees, which resumed hearings on the MKULTRA program in the summer of 1977, with many more details about the scope and substance of MKULTRA and its subprojects, including "greater insight into the scope of the unwitting drug testing" within the United States. (Milburn Decl. Ex. 28 at 5-7.) In addition, several former and current CIA officials, including Gottlieb, testified at these hearings about MKULTRA subprojects. (See id. Exs. 27 at 169-217, 28 at 1-50, 31 at 110-116.) However, none of the recovered documents or testimony at the hearings contain any reference to Glickman or to the administration of LSD to persons overseas in 1952 or to drug testing in France at any time.

> FN14. Exhibit 28 includes the statement and testimony of Admiral Stansfield Turner, former Director of Intelligence, before the United States Senate in 1977. See Project MKULTRA, The CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Senate Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Comm. on Human Resources, 95th Cong., 1st Sess., 1-50 (1977).

D. The CIA's Search for Victims

In the late 1970s the CIA undertook a search for victims of the CIA drug programs. (Laubinger Dep. at 75-76, 97-98.) To this end, from 1977 to 1980,

Frank Laubinger and another CIA employee reviewed records and interviewed people who might have information about potential victims. (Id. at 74-80, 97-98.) The CIA ultimately identified sixteen individuals who had been unwitting subjects of LSD administrations in the United States. (Id. at 77.) It did not identify any victims of overseas testing, and Laubinger testified that he found no evidence suggesting that the CIA conducted drug testing overseas in 1952 or in Paris at any time. (Id. at 44-47, 66, 77, 171-72, 175.)

PROCEDURAL HISTORY

Glickman filed an administrative tort claim with the CIA on December 22, 1981. The CIA denied the claim by letter dated December 1, 1982. Thereafter, Glickman filed a complaint on March 20, 1983 against the United States, the CIA, the Federal Bureau of Investigation, and John Does as unknown agents of the CIA. On September 13, 1983, he filed his Amended Complaint naming as defendants the United States, Helms and Gottlieb in their individual and official capacities, and John Does as unknown agents of the United States. In 1985, Judge Griesa denied several motions made by defendants under Fed.R.Civ.P. 12(b) and 56 but dismissed plaintiff's cause of action based on misrepresentation and deceit and also dismissed his claim for punitive damages against the United

States. Glickman v. United States, 626 F.Supp. 171, 175-76 (S.D.N.Y.1985).

*9 Over the next several years the case experienced a series of unfortunate delays largely beyond the Court's control, including placement on the suspense docket for over two years until January 8, 1992. See Kronisch v. United States, 1994 WL 524992, at *1-2 (S.D.N.Y. Sep.27, 1994) (Buchwald, M.J.) (describing procedural history). Then, on December 11, 1992, Glickman died, and the litigation again remained idle for several months until Gloria Kronisch, the executrix of Glickman's estate, was substituted as plaintiff and Sidney Bender was substituted as new counsel. Id. at *2. In late 1993 the case finally resumed at the stage where it had been suspended over five years earlier, with motion practice in connection with statutory and state secret privilege issues. Id. These issues were addressed in a Memorandum and Order dated September 27, 1994, which Your Honor affirmed on May 18, 1995. 1995 WL 303625 (S.D.N.Y. May 18, 1995) (Wood, J.). The last elements of discovery, which included depositions of the individual defendants and declassification of certain government documents, were completed by early 1996. Subsequently, defendant filed the instant motion for summary judgment, which is based on the following grounds: (1) the action is barred by the statutes of limitations applicable to FTCA and Bivens actions; (2) lack of subject matter

jurisdiction over the claims against Helms and Gottlieb in their official capacities and over plaintiff's request for a declaratory judgment; (3) lack of personal jurisdiction over Helms and Gottlieb; and (4) an absence of any facts from which a jury could reasonably infer that defendants caused Glickman's injuries.

DISCUSSION

I. Standard for Summary Judgment

The principles guiding the consideration of a motion for summary judgment are well-established. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact, which can be done by pointing to the lack of evidence to support an essential element of the non-moving party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir.1991).

Once the moving party has met its burden, the non-moving party must then set forth "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). See also Anderson, 477 U.S. at 256; Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir.1990). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, the non- moving party cannot rely on conclusory allegations alone, see Twin Laboratories v. Weider Health Fitness, 900 F.2d 566, 568 (2d Cir.1990), nor will " 'mere speculation or conjecture as to the true nature of the facts'" suffice to overcome a summary judgment motion. Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir.1990) (quoting Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir.1986), cert. denied, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987)).

*10 When viewing the evidence, "all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party." Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir.1988) (citations omitted). See also Adickes v. S.H. Kress & Co. ., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26

L.Ed.2d 142 (1970); Consarc Corp. v. Marine Midland Bank, 996 F.2d 568, 572 (2d Cir.1993). However, if a "rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of judgment is appropriate." Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir.1991). In other words, "[e]ntry of summary judgment indicates that no reasonable jury could return a verdict for the losing party." Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162 (2d Cir.1991).

II. Statute of Limitations

A. FTCA Claim

Defendant argues that plaintiff's claim against the United States is untimely. The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. S 2401(b). As a general rule, accrual of an FTCA claim occurs at the time of the plaintiff's injury. Kubrick v. United States, 444 U.S. 111, 120, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). In certain instances, however, accrual may be postponed "until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." Barrett v. United States, 689 F.2d 324, 326 (2d Cir.1982) (citing Kubrick, 444 U.S. at 120 n. 7),

cert. denied, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983). This diligence-discovery rule of accrual is applicable where a plaintiff "is blamelessly ignorant of the existence or cause of his injury," such as "where the Government conceals its negligent acts" from the plaintiff. Id. at 327. In such cases, where the defendant deliberately conceals material facts relating to the alleged wrongdoing, the diligence-discovery rule operates in a manner similar to the doctrine of equitable tolling, which is read into every federal statute of limitations period and which stops the limitations period from running "until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit ." Id. (quoting Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C.Cir.1977)); see Irwin v. Department of Veteran Affairs, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (statutory time limits in suits against the government are subject to equitable tolling); Glarner v. United States, 30 F.3d 697, 701 (6th Cir.1994) (FTCA statute of limitations is subject to equitable tolling).

The question of when precisely a plaintiff should be deemed sufficiently on notice of the "critical facts" of a claim for accrual purposes was addressed in Guccione v. United States, 670 F.Supp. 527 (S.D.N.Y.1987), aff'd on other grounds, 847 F.2d 1031 (2d Cir.1988), cert. denied, 493 U.S. 1020,

110 S.Ct. 719, 107 L.Ed.2d 739 (1990), where the district court, citing Kubrick and Barrett, held:

*11 Possession of the "critical facts" of a claim means knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it.... [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice. Whether a plaintiff "should have known" these critical facts, even if he did not actually know them, is decided by reference to whether a reasonable person exercising due and reasonable diligence would have discovered such facts.

Id. at 536 (citations omitted); see Kubrick, 444 U.S. at 122-25; Barrett, 689 F.2d at 328, 330.

The FTCA statute of limitations thus begins to run either "when the plaintiff knows of the injury and its cause or has a duty to inquire into its cause." Mendez v. United States, 732 F.Supp. 414, 422 (S.D.N.Y.1990) (citing Cragin v. United States, 684 F.Supp. 746, 754 (D.Me.1988), aff'd, 873 F.2d 1433 (1st Cir.1989)). Further, while "[s]uspicions may create a duty to inquire," a cause of action does

not accrue "when a person has a mere hunch, hint, suspicion, or rumor of a claim." Socialist Workers Party v. Attorney General of the United States, 642 F.Supp. 1357, 1413 (S.D.N.Y.1986) (citing Hobson v. Wilson, 737 F.2d 1, 35 (D.C.Cir.1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985)); see Liuzzo v. United States, 485 F.Supp. 1274, 1282 (E.D.Mich.1980) ("mere suggestion of wrongdoing" may provide injured party with sufficient information to require further investigation, but source and context of suggestion must be considered). [FN15] In this connection, it has been noted that where the facts of the case "involve covert activity by the FBI, normal inquiry is likely to be in vain." Socialist Workers Party, 642 F.Supp. at 1413 (citing Hobson, 737 F.2d at 35 n. 107). However, the fact that a reasonably diligent inquiry would not have uncovered government negligence is irrelevant for FTCA accrual purposes. Mendez, 732 F.Supp. at 426 (citing Cragin, 684 F.Supp. at 755); see Orlikow v. United States, 682 F.Supp. 77, 85 (D.D.C.1988) (claim accrued when plaintiff solicited information constituting a confession that he was unwitting subject of CIA experiment, even though CIA provided no information).

FN15. Suspicion may not be enough to trigger the statute of limitations in cases involving a layman's subjective belief regarding an aspect of medical science not yet known to the medical community. In Stoleson v. United States, 629 F.2d 1265, 1270 (7th

> Cir.1980), the plaintiff's belief that exposure to nitroglycerin caused her cardiovascular problems was insufficient to start the statute of limitations running because medical science did not yet recognize the causal connection. The "sincerity or ultimate vindication" of her belief was thus irrelevant. Id. In this case, the government's memorandum takes issue not with the allegation that Glickman suffered serious injury after being drugged with LSD (the "what" question), but with the allegation that CIA operatives were responsible for the incident (the "who" question). Since the latter question is not one that involves scientific or medical knowledge, Stoleson is not applicable here with respect to the plaintiff's duty to inquire.

Whether the diligence-discovery rule applies to a given FTCA claim is a factual question. Guccione, 670 F.Supp. at 536. In the present case, defendants do not dispute that this rule of accrual applies to plaintiff's claims against the United States. The question of whether a plaintiff should have known the critical facts of his FTCA claim by a certain date, and the "subsidiary question of whether he exercised due diligence to discover them," are also questions of fact normally reserved for trial. Id. at 537 (citing Barrett, 689 F.2d at 330). However, "where ... it is beyond dispute that plaintiff should have known and, indeed, actually knew the critical facts of his claim, summary judgment is appropriate." Id.; see Diltz v. United States, 771 F.Supp. 95, 101 (D.Del.1991); Orlikow, 682 F.Supp. at 85 (granting summary judgment against FTCA plaintiff on limitations grounds where,

despite any government concealment, plaintiff knew the "crucial elements" of the claim).

*12 As may be inferred, the parties here dispute the date upon which plaintiff knew or should have known the critical facts of his claim. Specifically, the parties dispute the date by which Glickman should have known enough about the CIA's drug experiments to obligate him to file a claim within two years. Given that Glickman filed the administrative claim with the CIA on December 22, 1981, the question is whether Glickman knew or should have known the critical facts regarding the CIA prior to December 22, 1979.

In considering this question, it is important first to determine which party bears the burden of proof. The FTCA's two-year time limit has been construed as a statute of limitations. See Kubrick, 444 U.S. at 117 (section 2401(b) is a "limitations provision" that should be regarded as a meritorious defense). Because statutes of limitations are affirmative defenses, see Fed.R.Civ.P. 8(c), defendants would normally bear the burden of proof, Schmidt v. United States, 933 F.2d 639, 640 (8th Cir.1991) (FTCA action). However, the burden of establishing an exception to the statute of limitations (such as the diligence discovery rule in FTCA cases) is on the plaintiff. See Gould v. United States Dept. of Health & Human Serv., 905 F.2d 738, 745-46 (4th Cir.1990), cert. denied, 498 U.S. 1025, 111 S.Ct.

673, 112 L.Ed.2d 666 (1991) (in FTCA case, plaintiff must show that due diligence was exercised and that critical information was nonetheless undiscoverable); Drazan v. United States, 762 F.2d 56, 60 (7th Cir.1985) (in FTCA action, burden is on plaintiff "to show that she had no reason to believe that she had been injured by an act or omission by the government"); Wollman v. Gross, 637 F.2d 544, 549 (8th Cir.1980), cert. denied, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981); but see Orlikow, 682 F.Supp. at 84 (without explanation, court held that it was defendants' burden to show that plaintiff knew of or could have discovered CIA involvement in exercise of due diligence).

The Second Circuit has held that a statute of limitations may operate in suits against the United States not only as an affirmative defense but also as a prerequisite to a court's assertion of subject matter jurisdiction over the action. Williams v. United States, 947 F.2d 37, 39 (2d Cir.1991), cert. denied, 504 U.S. 942, 112 S.Ct. 2277, 119 L.Ed.2d 203 (1992); see also Henderson v. United States, 517 U.S. 654, 116 S.Ct. 1638, 1651 n. 3, 134 L.Ed.2d 880 (1996) (Thomas, J., dissenting) (statutes of limitations in suits against the government are jurisdictional prerequisites). Indeed, some courts in this circuit have considered the FTCA time limit a jurisdictional prerequisite rather than a mere affirmative defense. See Leonhard v. United States, 633 F.2d 599, 624 (2d Cir.1980), cert. denied, 451

U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981) (untimely FTCA claims against United States "were properly dismissed for lack of jurisdiction"); Dillard v. Runyon, No. 95 Civ. 4899, 1996 WL 350692, at *8-9 (S.D.N.Y. Jun.25, 1996) (FTCA limitations period is jurisdictional in nature even though subject to doctrine of equitable tolling). Construing the FTCA time limit not as an affirmative defense but as a jurisdictional matter, however, still results in placing the burden of proof on the plaintiff. See Dillard, 928 F.Supp. 1316, 1996 WL 350692, at *13-14 (assuming that plaintiff must prove basis for equitable tolling to escape dismissal for lack of jurisdiction); Long v. Card, 882 F.Supp. 1285, 1289 (E.D.N.Y.1995) (same); see also Crawford v. United States, 796 F.2d 924, 929 (7th Cir.1986) (no jurisdiction over FTCA claim unless plaintiff could establish that he did not know nor could have discovered with reasonable diligence that Postal Service caused his accident); see generally 2A James W. Moore et al., Moore's Federal Practice P 12.07 [2.-1] (2d ed.1996) (once subject matter jurisdiction is challenged, burden of establishing it always rests on party asserting jurisdiction) (citing cases).

*13 Defendants argue that plaintiff's claim accrued at the latest on January 28, 1978, when Glickman wrote to Senator Edward Kennedy that he believed he was one of the unsuspecting victims of the CIA's drug experiments during the 1950s. (See Milburn

Decl. Ex. 53.) Glickman's first suspicions of CIA involvement arose in 1977 during a telephone call from his sister, Gloria Kronisch. Having read an article on the subject, Kronisch asked him if he "had heard that the CIA had experimented with L.S.D. on unsuspecting persons in foreign countries in the 1950's." (Glickman Aff. P 28; Glickman Dep. at 225.) Kronisch sent him the newspaper article. (Glickman Dep. at 267, 283.) Glickman then began to watch the Kennedy Committee hearings on television and, listening to testimony regarding the testing of LSD overseas during the 1950s, for the first time formed a belief that he had been a victim. (Glickman Aff. P 28; Glickman Dep. at 238-39, 283.) In his affidavit, Glickman stated that "for the first time since 1952 the events starting at the Select Cafe and all the years of agony that followed returned in a terrifying patch-work." (Glickman Aff. P 28.) Similarly, at his deposition, Glickman stated that his new awareness of the CIA experiments led him to "the logical conclusion after remembering the events of my life in 1952[ ] that I was one of those victims." (Glickman Dep. at 225.)

Thereafter, following "many months" of seclusion in "shock and fear," Glickman began to contact various government officials, including Senator Kennedy, in the fall of 1977. (Glickman Aff. P 28; see Milburn Decl. Exs. 45, 51, 55.) Glickman made a freedom of information request to the CIA on October 3, 1977, seeking all files maintained under

his name and all documents containing his name. (See Milburn Decl. Ex. 45.) At his deposition, Glickman stated that, at the time, he assumed that "inasmuch as I was one of those victims, they would have my record in my personal file." (Glickman Dep. at 283.) In a letter to the United States Attorney General dated November 7, 1977, Glickman stated that he "believes [him]self to be one of those unsuspecting persons involved" in the CIA drug experiments. (Milburn Decl. Ex. 55.) Glickman restated this belief in the second letter to Senator Kennedy, dated January 28, 1978. (See id. Ex. 53.) Before the CIA had completed its search, Glickman wrote to the agency again on January 30, 1978 and specified "that Paris France in the 1950's is the area for you to focus upon." (See id. Ex. 49.) Also in 1977 or 1978, plaintiff made initial though unsuccessful attempts to seek legal help, contacting both the ACLU and Ramsey Clark. (Glickman Dep. at 279-81.)

Despite these suspicions and inquiries, plaintiff argues that the claim did not accrue until April 1981, when an acquaintance of Glickman, Dean Corren, went to Washington, D.C. and examined CIA files. (See Milburn Decl. Ex. 43 [Affidavit of Dean Corren, dated August 19, 1983, P 3]). According to Corren, this research uncovered "concrete information" that CIA personnel used "drugs and other mind control techniques in foreign countries prior to and during 1952." (Id.) Plaintiff

contends that this information for the first time provided Glickman with a basis for filing his claim, which he did in December 1981.

*14 The first question to be considered is whether the information about CIA drug testing that plaintiff had in 1978 constituted knowledge of the critical facts of his claim. Knowledge of the critical facts has been broadly construed by courts in this circuit to include "knowledge that could lead to [ ] the basic facts of the injury," Guccione, 670 F.Supp. at 536, or knowledge that gives the plaintiff "a duty to inquire into [the] cause" of the injury, Mendez, 732 F.Supp. at 422. In 1978, plaintiff believed he was a CIA victim based on his memory of events in 1952 and Senate testimony regarding CIA drug testing abroad in the 1950s. His letters to the CIA and Senator Kennedy, as well as his attempts to seek legal advice, may be sufficient to deem him knowledgeable of the critical facts. See Orlikow, 682 F.Supp. at 85 (claim accrued when plaintiff solicited information as to whether he was unwitting subject of CIA experiment); Guccione, 670 F.Supp. at 536 (FTCA claim will accrue when plaintiff knows or should know enough of the critical facts to protect himself by seeking legal advice).

In any event, it is difficult to conclude that the information plaintiff held--even if amounting only to a belief based on inference--did not create, at the

least, a duty to inquire further to determine if he was in fact a CIA victim. See Socialist Workers Party, 642 F.Supp. at 1413 (cause of action does not accrue when person has mere suspicion of claim, but suspicion may create a duty to inquire); Liuzzo, 485 F.Supp. at 1282 ("mere suggestion of wrongdoing" may provide sufficient information to require further inquiry). Therefore, whether plaintiff's claim accrued in 1978 or at some later date, he was obliged in 1978 to investigate further in the exercise of reasonable diligence. See Barrett, 689 F.2d at 326 (accrual may be postponed until plaintiff with reasonable diligence should have discovered the critical facts); Guccione, 670 F.Supp. at 536 (whether plaintiff should have known critical facts is decided by reference to whether reasonable person exercising due and reasonable diligence would have discovered them).

The question thus becomes whether plaintiff exercised due and reasonable diligence once he was obliged to investigate his potential claim. Plaintiff has offered no explanation for the gap in time between his initial inquiries in 1977 and 1978 and Corren's trip to Washington in 1981. Plaintiff has not argued, for example, that the "concrete information" Corren uncovered was unavailable earlier. In fact, by October 1978, the CIA had made available, via FOIA request, thousands of pages of documents relating to the drug experimentation programs, and, beginning in January 1979, it made

some documents available, upon written request, at the CIA Reading Room in Virginia. (McGinn Decl. P 6.) Therefore, plaintiff has failed to establish that he exercised due and reasonable diligence once he was obliged to investigate his potential claim. See Kubrick, 444 U.S. at 123-24 (failure to inquire into whether medical treatment was negligent does not prevent accrual of FTCA claim); Gould, 905 F.2d at 745-46 (FTCA claim was barred where there was no evidence to support assertion that due diligence was exercised and critical facts were undiscoverable). Plaintiff's FTCA claim against the United States should be dismissed as untimely.

***15** In reaching this conclusion we are mindful "that statutes of limitations often make it impossible to enforce otherwise perfectly valid claims," Kubrick, 444 U.S. at 361. "But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." Id . The specific purpose of the FTCA limitations provision is "to encourage the prompt resolution of claims" against the government and it should be regarded as a meritorious defense, id. at 117, even if its strict application results in hardship for plaintiffs, see Gould, 905 F.2d at 747; Mendez, 732 F.Supp. at 422.

B. Bivens Claims

In the Amended Complaint, plaintiff alleges that both Helms and Gottlieb took part in "devising and executing a program of experimental L.S.D. testing and electro shock treatment, of which the Plaintiff was a subject," (Am.Comp.P 45), and that they engaged in a "subsequent cover-up" of this program, (id. P 47). In addition, plaintiff claims that Gottlieb may have been the person in the Paris cafe who gave him the drink which contained LSD. (Id. P 18.) Defendants argue that these claims against Helms and Gottlieb in their individual capacities are barred by the statute of limitations applicable to Bivens actions.

Federal courts sitting in New York must apply a three-year limitations period to Bivens claims. Chin v. Bowen, 833 F.2d 21, 23-24 (2d Cir.1987). When state law supplies the limitations period, it also supplies associated tolling rules. Wilson v. Garcia, 471 U.S. 261, 269, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (section 1983 action); Lewellen v. Morley, 875 F.2d 118, 120 (7th Cir.1989) (Bivens action); Cullen v. Margiotta, 811 F.2d 698, 718 (2d Cir.), cert. denied, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987) (section 1983 action). While New York State law thus supplies the statute of limitations and applicable tolling doctrine, "federal law determines when a federal claim accrues." Eagleston v. Guido,

41 F.3d 865, 871 (2d Cir.1994), cert. denied, 516 U.S. 808, 116 S.Ct. 53, 133 L.Ed.2d 18 (1995). The claim accrues when the plaintiff "knows or has reason to know of the allegedly impermissible conduct and the resulting harm." Veal v. Geraci, 23 F.3d 722 F.2d 724 (2d Cir.1994); see Eagleston, 41 F.3d at 871 (quoting Cullen, 811 F.2d at 725). A plaintiff has "reason to know" of his cause of action when he should have discovered it in the exercise of due and reasonable diligence. See, e.g., Friedman v. Estate of Presser, 929 F.2d 1151, 1159 (6th Cir.1991); Blanck v. McKeen, 707 F.2d 817, 819 (4th Cir.), cert. denied, 464 U.S. 916, 104 S.Ct. 279, 78 L.Ed.2d 258 (1983); see also Fassnacht v. United States, No. CIV A. 95-3624, 1996 WL 41621, at *2 (E.D.Pa. Feb.2, 1996).

Defendant argues that plaintiff's claims against Helms and Gottlieb accrued at the same time as his FTCA claim against the United States. i.e., in January 1978, over five years before the filing of his federal complaint. See Payne v. Geary, 651 F.Supp. 1357, 1358 (E.D.N.Y.1987) (section S 1983 limitations period runs to date of filing of federal complaint). Conceivably, plaintiff could argue that the limitations period for his Bivens claims should be tolled during the pendency of his administrative tort claim. But see Uhl v. Swanstrom, 876 F.Supp. 1545, 1559 (N.D.Iowa 1995) (filing of federal tort claim does not toll statute of limitations on Bivens action), aff'd on other grounds, 79 F.3d 751 (5th

Cir.1996). However, assuming for the moment that January 1978 is the date of accrual, the limitations period would still run out prior to the filing of the tort claim in December 1981.

*16 In the context of plaintiff's FTCA claim, we have already determined that by January 1978 plaintiff had at least a duty to inquire with due and reasonable diligence into his potential claim against the government. Surely, plaintiff was equally obliged at this point to make a reasonably diligent inquiry as to the identity of any individuals who played a role in causing his injury. See generally Hobson, 737 F.2d at 35 n. 107 (once plaintiff has information sufficient to put him on inquiry notice, limitations period begins to run if he fails to reasonably exercise due diligence); Fassnacht, 1996 WL 41621, at *3 (in Bivens and S 1983 action, limitations period begins upon "sufficient notice" to alert plaintiff to need to investigate). As discussed above, however, given plaintiff's failure to explain the apparent lack of any investigation at all between January 1978 and April 1981, he has not established a genuine issue of fact with respect to the issue of due diligence. [FN16]

FN16. Plaintiff argues that the CIA's destruction of documents related to the drug programs amounts to a concealment of the critical facts of Glickman's injury, and that the limitations period should thus be tolled. However, assuming arguendo that defendants did conceal relevant evidence, the statute of limitations is

> no longer tolled when the plaintiff either knew or failed to exercise reasonable diligence in discovering the basic facts of his injury. See, e.g., Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir.1995) (fraudulent concealment does not toll limitations period after plaintiff discovers or by exercising reasonable diligence should have discovered his claim under S 1983).

In any event, as to Gottlieb, it is clear and undisputed that plaintiff knew in 1977 that Gottlieb had headed the CIA's drug experimentation projects in the 1950s. (See Glickman Dep. at 286; Pl.'s Mem.Opp. at 62.) Glickman has stated that he watched on television as Gottlieb testified about the projects before the United States Senate. (See Original Glickman Aff. P 27; id. Milburn Decl. Ex. 62 [Descend the Wind, at 29-30].) As for Helms' role in the projects, plaintiff does not argue that Glickman could not have discovered it within the limitations period. In fact, Helms' activities with respect to MKULTRA are documented in, inter alia, the report of the Church Committee, published in 1976. (See Milburn Decl. Ex. 1.) Therefore, we recommend that plaintiff's Bivens claims against Helms and Gottlieb be rejected as untimely.

III. Subject Matter Jurisdiction

Although we have recommended that plaintiff's claims be dismissed as untimely, we will proceed to discuss the other grounds upon which the present motion is based. Apart from the limitations issues,

defendants contend that the Court lacks subject matter jurisdiction over certain portions of the Amended Complaint. Specifically, they assert lack of subject matter jurisdiction over any claims against Helms and Gottlieb in their official capacities and over plaintiff's request for declaratory relief.

A. Official Capacity Claims

A Bivens claim for money damages can be maintained against a federal official only in his individual capacity. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir.1994). Therefore, to the extent that plaintiff's claims constitute a Bivens action for money damages against Helms and Gottlieb in their official capacities, "they [are] properly dismissed for want of subject matter jurisdiction." Id. It is unsettled whether official capacity claims for injunctive or declaratory relief are cognizable. See Mardsen v. Federal B.O.P., 856 F.Supp. 832, 835 (S.D.N.Y.1994) (stating that such claims "may be cognizable"); Marte v. INS, 562 F.Supp. 92, 94-95 (S.D.N.Y.1983) (granting plaintiff's motion to join individual defendants "in their official capacities and solely for the purposes of declaratory and injunctive relief," inasmuch as government did not object). However, to the extent that plaintiff's claims against Helms and Gottlieb are for declaratory relief, the Court lacks subject matter

jurisdiction over them for the reasons expressed infra.

B. Declaratory Relief

*17 In this action plaintiff seeks not only money damages but a declaration that the defendants violated Glickman's constitutional rights. (See Am.Compl. at 13.) The Declaratory Judgment Act, 28 U.S.C. SS 2201-02, permits a federal court to make a declaration of rights "[i]n a case of actual controversy within its jurisdiction," id. S 2201(a), but does not itself provide an independent basis for subject matter jurisdiction, Schilling v. Rogers, 363 U.S. 667, 671 (1960) (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)); S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exchange, Inc., 24 F.3d 427, 431 (2d Cir.1994) (citing In re Joint E. & So. Dist. Asbestos Litig. (In re Keene Corp.), 14 F.3d 726, 731 (2d Cir.1993)). To put it another way, federal courts have no jurisdiction to render declaratory judgments where the parties lack standing or where "the underlying questions are moot or otherwise non- justiciable." Pancake v. McCarthy, 806 F.Supp. 378, 379 (E.D.N.Y.1992). Thus, a claim for declaratory relief may only be addressed by this Court if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and

reality." Schwimmer v. Kaladjian, 834 F.Supp. 93, 98 (S.D.N.Y.1993) (quoting Preiser v. Newkirk, 422 U.S. 395, 402, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975)). Moreover, where the parties no longer have a continuing relationship, a plaintiff seeking declaratory relief must show that the conduct complained of "is an imminent or even probable event." Schwimmer, 834 F.Supp. at 99 n. 7 (quoting Long Island Lighting Co. v. County of Suffolk, New York, 604 F.Supp. 759, 763 (E.D.N.Y.1985)); see Preiser, 422 U .S. at 402-03 (since there was no reasonable expectation that the wrong would be repeated, the issues presented were not of the sort capable of repetition, yet evading review); Stronko v. Bergin, 843 F.Supp. 827, 828-829 (N.D.N.Y.1994) (action for declaratory relief not warranted where there was "no plausible way that the plaintiffs will come into conflict with" the defendant in the future); Pancake, 806 F.Supp. at 379-80 (underlying questions were moot where plaintiff did not claim continuing violation of federal law or any threat of future violations).

Given these standards, the claim for declaratory relief here is clearly not justiciable. Plaintiff, the executrix of Glickman's estate, does not allege any facts suggesting that she may be subject to the defendants' alleged unconstitutional conduct in the future. Nonetheless, plaintiff argues that the claim for declaratory relief is not moot because a declaration that defendants acted unconstitutionally

"is very important to this plaintiff in light of Mr. Glickman's years of suffering." (Pl.'s Mem.Opp.Summ.J. at 76.) However, the fact that plaintiff truly desires a declaratory judgment does not make the underlying issue justiciable. Plaintiff also claims that she has "a stake for the benefit of the estate to seek declaratory relief," because "[o]ne of the principal assets in Mr. Glickman's estate is his paintings." (Id.) Perhaps plaintiff intends for us to infer that the paintings would be made more valuable by a judicial declaration that Glickman's constitutional rights were violated in 1952. Such a statement would be speculative at best. But whatever plaintiff means to suggest, she does not provide any basis for finding that Glickman's estate may suffer from any repeated or continuing violation of federal law. We note that defendants do not dispute that plaintiff has standing to pursue this action as one for money damages. The prayer for declaratory relief should therefore be dismissed.

IV. Personal Jurisdiction

*18 Defendant has also argued that the Court lacks personal jurisdiction over Helms and Gottlieb. Plaintiff concedes that neither individual resides in New York. "Personal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits--subject, of course, to certain constitutional limitations of due process." Robinson, 21 F.3d at 510. Under the New

York long-arm statute, personal jurisdiction may be asserted over a nondomiciliary who, inter alia, "transacts any business within the state," N.Y.Civ.Prac.L. & R. S 302(a)(1), or "commits a tortious act within the state," N.Y.Civ.Prac.L. & R. S 302(a)(2). Plaintiff here does not allege that any other subsection of S 302(a) applies to these defendants. When a district court decides a pretrial motion to dismiss for lack of personal jurisdiction on the basis of the written record (as opposed to holding an evidentiary hearing), the plaintiff "need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials" to defeat the motion. Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir.1981); accord Welinsky v. Resort of the World D.N.V., 839 F.2d 928, 930 (2d Cir.1988).

A. Helms

The Amended Complaint charges that Helms was involved in planning, devising, and executing the drug programs and that these programs were set into operation in Washington, D.C. and New York, New York. (Am.Compl.PP 12, 21, 45.) Plaintiff further claims that both Helms and Gottlieb "undertook actions and conduct at the time the actions complained of were committed." (Id. P 14.) Nonetheless, plaintiff has not alleged specifically that Helms transacted any business, committed a tort, or did anything in else in New York that could

subject him to jurisdiction under S 302(a), nor has discovery revealed any such conduct. See Barrett v. United States, 646 F.Supp. 1345, 1350 (S.D.N.Y.1986) ("mere conclusory statements cannot be relied upon to establish this prima facie case") (citing Newmark v. Abeel, 102 F.Supp. 993, 994 (S.D.N.Y.1952) (Weinfeld, J.)). Rather, it seems clear that Helms operated principally from CIA headquarters in Washington, D.C. (See Helms Decl. P 3.) See Lee v. Carlson, 645 F.Supp. 1430, 1433-34 (S.D.N.Y.1986) (Weinfeld, J.) (no jurisdiction over non-resident Director of Federal Bureau of Prisons, whose office was is Washington, D.C., despite his responsibility for managing federal prison system, including New York facility at which alleged torts occurred).

Plaintiff contends that Helms may yet be subject to the court's jurisdiction based on the tortious conduct of persons acting as Helms' agents within New York. Assuming arguendo that any persons in New York working for Helms committed a tort that was in some way connected to Glickman's injury, plaintiff must still show that the agent acted on Helms' behalf in the latter's individual capacity. Green v. McCall, 710 F.2d 29, 33-34 (2d Cir.1983); Grove Press, Inc. v. Angleton, 649 F.2d 121, 122-23 (2d Cir.1981); Marsh v. Kitchen, 480 F.2d 1270, 1273 (2d Cir.1973); Wahad v. FBI, 132 F.R.D. 17, 23 (S.D.N.Y.1990); Barbera v. Smith, 654 F.Supp. 386, 393-94 (S.D.N.Y.1987); Barrett, 646 F.Supp.

at 1351-52. In Grove Press, the plaintiffs sued the CIA and eight former CIA officials, alleging unconstitutional surveillance and seeking, inter alia, money damages from the officials as individuals. The Second Circuit found no jurisdiction over the nonresident officials under S 302(a)(2) because nothing suggested they "expected to benefit as individuals" from the wrongful conduct of CIA personnel in New York. Likewise, there is simply no evidence here that any of the individuals in New York who worked on the CIA's drug programs were acting as anything other than agents for the United States government. "More than this [is] required to make a prima facie showing" that they were Helms' personal agents. Grove Press, 649 F.2d at 123; see Barbera, 654 F.Supp. at 393-94.

B. Gottlieb

*19 For personal jurisdiction to exist over Gottlieb pursuant to S 302(a)(1), plaintiff must first show that Gottlieb's contacts with New York were "purposeful activities" that justify bringing him before a New York court as a matter of due process. McGowan v. Smith, 52 N.Y.2d 268, 271-72 437 N.Y.S.2d 643, 644-45 (1981) (citing cases); see Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) (there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and

protections of its laws"); accord Fox v. Boucher, 794 F.2d 34, 37 (2d Cir.1986). In this connection, defendants concede that Gottlieb made approximately six visits to New York in 1952, met with George White on two or three occasions "to discuss his becoming a consultant for the CIA in LSD research," and may have visited Dr. Harold Abramson, who later became a MKULTRA consultant. (Gottlieb Decl. P 4.) Both White and Abramson "regularly reported their [research] results to Gottlieb (Gottlieb Decl. P 4.). In addition, between 1951 and 1953, Gottlieb visited New York on one or more occasions to self-administer LSD with other TSD officials. (Id. P 5.)

Assuming arguendo that these contacts are sufficiently purposeful under S 302(a)(1), plaintiff still must show that his cause of action against Gottlieb arose out of the latter's New York activities. McGowan v. Smith, 52 N.Y.2d at 272, 437 N.Y.S.2d at 645, 419 N.E.2d 321 (requiring "substantial relationship" between business transacted and cause of action sued upon), quoted in Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 763-64 (2d Cir.1983). [FN17] The requirement of a "nexus" between the New York activity and the cause of action must also be met if the asserted basis for personal jurisdiction is S 302(a)(2). Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1052 (S.D.N.Y.1987) (citing Business Trends Analysts v. The Freedonia Group,

Inc., 650 F.Supp. 1452, 1455 (S.D.N.Y.1987) (Weinfeld, J.)).

> FN17. In McGowan, a Japanese trading company contested jurisdiction in New York based on an incident in which a New York resident was injured out of state by a product originally sold by the Japanese company to a New York store. Several visits which representatives of the foreign defendant made to New York for the purpose of "general marketing research and ascertaining what type of products might be salable in New York" merely established a "transitory physical presence" in the state, insufficient to create an "articulable nexus" to the cause of action. McGowan, 52 N.Y.2d at 272, 437 N.Y.S.2d at 645, 419 N.E.2d 321.

In this action, plaintiff claims that Gottlieb and CIA officials "made New York the setting for their projects from which they launched much of their research." (Pl.'s Mem.Opp.Summ.J. at 71.) Plaintiff states in conclusory fashion that "Glickman was part of that research, part of the testing" that started in New York. (Id . at 70-71.) Defendants dispute not that MKULTRA research was conducted in New York but that the research had any connection with what happened to plaintiff in Paris in 1952, given that the LSD researchers based in New York had no documented connection with Glickman, France, or overseas testing. Although the New York research may be logically viewed as laying the scientific groundwork for the later experiments overseas on unwitting subjects, there is no support

for the claim that Gottlieb's decisions concerning the funding of and supervision over these overseas programs took place somewhere other than Washington, D.C. (See Gottlieb Decl. P 3.) Finally, as for Gottlieb's alleged direct participation in causing Glickman's injury, plaintiff merely speculates that "the Paris venture may have been discussed in New York with White." (Pl.'s Mem.Opp.Summ.J. at 71.) White's diaries do not indicate that any such discussion occurred. (See Bender Decl.Ex. 5.)

*20 Under these circumstances, we cannot find that plaintiff has made a prima facie showing that either Helms or Gottlieb are subject to personal jurisdiction in New York. Therefore, had we not already found the Bivens claims against these individuals to be time-barred, we would recommend that they be dismissed for lack of personal jurisdiction.

V. Merits

Although we have recommended dismissal of plaintiff's Amended Complaint on multiple jurisdictional and procedural grounds, we will proceed to discuss the merits of her causes of action. It is important to recognize that, at least for purposes of this motion, defendants do not contest that Glickman unknowingly consumed a drink laced with LSD at the Cafe Select in Paris in October

1952. Nor do they attempt to contest Glickman's account that the drink was given to him by an American with a clubfoot. Rather, they claim that plaintiff cannot establish causation in that she cannot present a triable issue of fact as to whether Gottlieb and/or other persons associated with the CIA were responsible for the incident at the cafe and for Glickman's alleged mistreatment at the American Hospital in Paris. In response, plaintiff claims the existence of "overwhelming evidence" that defendants gave or authorized the administration of LSD to Glickman. (Pl.'s Mem.Opp.Summ.J. at 4). It is unclear what this evidence is other than a dizzying series of conjectures and speculations dressed up to look like reasonable inferences. The strongest support plaintiff offers is along the following lines. Relying on the report of psychiatrist and "LSD expert" Dr. Lester Grinspoon, (id. at 5), plaintiff argues that "the potential pool of American individuals who could have slipped LSD into Glickman's drink is basically narrowed to the defendants," (id. at 19), since "in 1952 LSD was known only to a few researchers and certain government agents," (Bender Decl.Ex. 1 [Report of Lester Grinspoon, M.D.] at 8). Moreover, it appears that the CIA, and specifically Gottlieb, was engaged in some form of LSD research in 1952, (see Milburn Decl.Exs. 13, 24-26; Laubinger Dep. at 139- 40), and that CIA officials knew how to surreptitiously place LSD in a person's drink. (See id. Exs. 5, 10.) Gottlieb

therefore had interest in and access to LSD during the relevant timeframe. Plaintiff also points to the confidential affidavit of a former CIA employee who states that the CIA "definitely had a presence in Paris, France in 1952," (Bender Decl.Ex. 4 [filed under seal]), and to the fact that Gottlieb never produced his passport.

Taking as true that Gottlieb and a handful of other researchers connected with the CIA were among the few who then knew about LSD, and that the CIA was active in Paris in 1952, plaintiff has at least established that CIA involvement in Glickman's injury cannot be entirely ruled out. [FN18] However, plaintiff has established nothing beyond that. There is still no evidence in the record from which a reasonable jury could conclude that the early CIA research into LSD, whether conducted by or merely overseen by Gottlieb, ever involved administrations of the drug to unwitting Americans overseas. In sum, a careful review of the entire record reveals no evidence from which a reasonable jury could infer that Gottlieb or any other CIA operative was involved in drug testing or electroshock treatment on unwitting American citizens in Paris or elsewhere overseas in 1952. We note that the mere fact that both the man in the cafe and Gottlieb had clubfeet, by itself, does not create more than a speculative link that the two men are the same and thus cannot defeat a summary judgment motion, at least not in the face of

unrefuted testimony that Gottlieb was not overseas in 1952. [FN19] We note that it is not defendants' burden to prove a negative, namely, that they were not involved in Glickman's injury. Rather, it is plaintiff's burden to show that, upon the entire record, a jury could reasonably infer that defendants were the responsible parties. Plaintiff has failed to meet this burden.

FN18. Plaintiff's own expert, Professor Alan Scheflin, who has studied the CIA's drug programs for many years, will opine only that "it is quite possible that an employee of the CIA did administer LSD or some other chemical substance to Mr. Glickman." (Milburn Decl.Ex. 61 [Affidavit of Professor Alan W. Scheflin, dated August 19, 1983] at 1.) While stating that Glickman's story "follows what was a routine form of drug testing by the CIA during that period of time," (id. at 7), Scheflin was "not prepared to say that this drugging did happen," (id. at 1), and explicitly declined to say "[w]hether he is in fact a victim," (id. at 7). In addition, Scheflin concluded only that it was "possible" that CIA agents in Paris engaged in surreptitious testing of LSD, based on "the fact that LSD was in Frankfurt, Germany" which was "reasonably enough close to Paris that agents might or could have gone to Paris with drugs." (Bender Decl.Ex. 16 [Deposition of Alan Scheflin, taken April 15, 1988] at 292-93.) These statements amount only to an opinion that a causal connection between the incident involving Glickman and CIA drug testing is theoretically "possible," not that such a connection is likely or probable.

FN19. Plaintiff offers the following argument in a footnote:

On October 20, 1952, Gottlieb met White in New York and on October 30, 1952, White met Gottlieb in Washington. (PX 5, White's diary). Thus there was a window of opportunity between those dates for Gottlieb to have flown to Paris, given the LSD laced drink to Mr. Glickman, and returned to the United States.

(Pl.'s Mem.Opp.Summ.J. at 18 n. 6.) At most this "window of opportunity" establishes that it may not have been impossible to place Gottlieb in Paris in October 1952. But the notion that his presence there was not impossible surely does not itself create a genuine issue as to whether he was in fact present at the cafe.

*21 In reaching this conclusion we find it significant that plaintiff has received substantial discovery materials from the CIA. Defendants produced approximately 30,000 pages of documents, although many were heavily redacted by the CIA on the basis of privilege. Kronisch, 1994 WL 524992, at *1. However, the Court allowed plaintiff to choose any fifty of those documents for the Court's in camera review. Id. at *1-2. After a careful examination of these documents in unredacted form, we noted:

> [N]one appears to contain any reference to any experiment conducted in France on or about October 1952. Of course, the possibility exists that a relevant piece of information might remain somewhere in the thousand pages of documents not included in this sample (as is the case any

> .ime a court reviews a sample of documents in lieu of the entire set). However, we have endeavored to eliminate this possibility by allowing plaintiff to choose the sample that was reviewed by the Court, based upon her view as to which documents would be the most advantageous to her case. As we have found no information in the documents to suggest that plaintiff was a victim of LSD research by the CIA, there is a solid basis to conclude that the other documents are irrelevant as well.

Id. at *3.

Plaintiff's final contention with respect to the merits is that an adverse inference should attach to defendants' destruction of MKULTRA files--ordered by Helms and Gottlieb in 1973--especially given the Church Committee's finding that the destruction "prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program." (Church Report at 404.) To draw an adverse inference against a party that has destroyed evidence, courts "must initially determine if there was a duty to preserve evidence. If such a duty existed, courts then consider both the intent of the spoliator as well as the contents of the destroyed evidence." Weinrich v. Sandhaus, 850 F.Supp. 1169, 1181 n. 19 (S.D.N.Y.1994); see Skeete v. McKinsey & Co., Inc. ., No. 91 Civ. 8093, 1993 WL 256659, at *5 (S.D.N.Y. July 7, 1993);

Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y.1991). Defendants argue that in 1973 no litigation, administrative action, or Congressional investigation had yet begun, and that Helms' and Gottlieb's professed reasons for the destruction have nothing to do with fear of future litigation.

We would be hesitant to determine at the summary judgment stage either that defendants had no duty to preserve the documents or that their destruction was not intentional, i.e., that "it was 'not intended to prevent the use of this evidence in litigation.'" Weinrich, 850 F.Supp. at 1181 n. 19 (quoting Turner, 142 F.R.D. at 74). First, we observe that some courts have imposed an obligation to preserve evidence "where a party is on notice that litigation is likely to be commenced." Skeete, 1993 WL 256659, at *4 (quoting Turner, 142 F.R.D. at 73). Gottlieb has stated that his reasons for destroying the documents included his fears that they were "capable of being misunderstood by anyone not throughly familiar with their background" and that the researchers who collaborated with the CIA could face severe reputational damage if the files were disclosed. (Milburn Decl.Ex. 27 at 195; see Gottlieb Dep. at 207-08, 614-17.) Helms' stated rationale for his approval of the destruction is similar. (Church Report at 403-04; Helms Dep. at 277-79.)

*22 It is somewhat hard to believe that both Gottlieb and Helms feared were concerned only with the effect of disclosure on other persons connected to the drug programs, and not with the possible consequences to themselves or to the CIA. Additionally, one can interpret Gottlieb's fear that the documents could be "misunderstood" in a variety of ways. Thus, we do not rule out a jury reasonably finding that someone in Helms' or Gottlieb's position would have considered the disclosure of MKULTRA files to result in potentially serious damage to him as an individual, such as becoming the subject of lawsuits brought by victims. Whether defendants' stated reasons for the destruction are in fact their true reasons is an issue of credibility best left for a trial. Therefore, we will presume for purposes of this motion that defendants had a duty to preserve the files and that their destruction was intentional. [FN20]

> FN20. An adverse inference may be appropriate even on a finding of mere negligent destruction. See, e.g., Skeete, 1993 WL 256659, at *6-7 (discussing split of authority on this question).

This presumption does not end the Court's inquiry. "Before an adverse inference is to be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence." Turner, 142 F.R.D. at 76; see Stepak v. Aetna Life & Casualty Co., Civ. No. H:90CV00886, 1994 WL 858045, at *20

(D.Conn. Aug.29, 1994); Skeete, 1993 WL 256659, at *7. Moreover, although "[a] showing of bad faith by itself is the basis for some inference that the evidence destroyed is detrimental to the destroyer .... some extrinsic evidence of the content of the evidence is necessary for the trier of fact to be able to determine in what respect and to what extent it would have been detrimental." Turner, 142 F.R.D. at 77; see Nation-Wide Check Corp. v. Forest Hill Distributors, Inc., 692 F.2d 214, 218-19 (1st Cir.1982) (court drew adverse inference only after observing that substantial circumstantial evidence supported facts to be inferred); Stanojav v. Ebasco Services, Inc., 643 F.2d 914, 923-24 (2d Cir.1981) (employer's failure to produce certain records creates no adverse inference of discrimination where records appeared to have no relevance to that issue). [FN21]

> FN21. It follows that, where the destruction is merely negligent rather than willful, such corroboration is even more important, since there is no bad faith from which to infer the evidence would have been detrimental. Skeete, 1993 WL 256659, at *7 (citing Turner, 142 F.R.D. at 77).

In this case, plaintiff must show a likelihood not only that the destroyed documents would be harmful to defendants generally, but that they would be harmful to defendants in the context of this litigation. Specifically, plaintiff must present evidence tending to show that the files would have

contained a reference either to Glickman or to any overseas LSD testing on unwitting American subjects in Paris in 1952. Plaintiff is unable even to approach this level of specificity and has instead engaged in pure speculation as to the content of the destroyed files. See Skeete, 1993 WL 256659, at *7 (adverse inference inappropriate where party could only speculate as to content of lost or destroyed materials); cf. Stepak, 1994 WL 858045, at *20 (where plaintiff identified no relevant documents that were destroyed, court will not apply "broad inference" that destroyed documents would support plaintiff's claim).

*23 As the Second Circuit has instructed, an adverse inference does not operate to create evidence where no evidence exists, and it cannot supply a missing element of a plaintiff's prima facie case. Stanojev, 643 F.2d at 924 n. 7. In its discussion of a jury charge on "records not produced at trial," the Second Circuit in Stanojev quoted the "perspicacious observation" of Judge Friendly, in the "analogous case" of a missing witness charge:

"It would have been more accurate to characterize the inference ... as permitting the jury 'to give the strongest weight to the evidence already in the case in favor of the other side....' The jury should not be encouraged to base its verdict on what it speculates the absent witnesses would have testified to, in the absence of some direct

> evidence." Felice v. Long Island Railroad Co., 426 F.2d 192, 195 n. 2 (2d Cir.), cert. denied, 400 U.S. 820, 91 S.Ct. 37, 27 L.Ed.2d 47 ... (1970) (citations omitted).

Id. Similarly, because we have already concluded supra that plaintiff has failed to present sufficient evidence on the causation element of her claims, no adverse inference should attach to the destruction of MKULTRA documents. While these materials may have contained the names of victims of the CIA's LSD experiments, no extrinsic evidence exists to suggest that Glickman's name would be among them. Therefore, absent our prior recommendations to reject plaintiff's claims on procedural and jurisdictional grounds, we would recommend granting defendants' motion on the grounds that plaintiff is unable to show a genuine issue of material fact with respect to the merits of her claims.

CONCLUSION

For the foregoing reasons, we respectfully recommend that defendants' motion be granted, that plaintiff's motion be denied, and that the Amended Complaint be dismissed. Copies of this Report and Recommendation have been mailed to all parties, who are hereby instructed that any objections to the Report and Recommendation must, in accordance with Fed.R.Civ.P. 72, be filed with Your Honor

within ten days, unless an extension of time is granted by you. Failure to object to the Report within ten days will preclude appellate review. 28 U.S.C. S 636(b)((1) and Fed.R.Civ.P. 6(a) and 72.

Dated: August 30, 1996

Respectfully Submitted,

By: /s/
NAOMI REICHE BUCHWALD
United States Magistrate Judge

APPENDIX F

United States District Court, S.D. New York.

Gloria KRONISCH, Executrix of the Estate of Stanley Milton Glickman, Plaintiff,
v.
UNITED STATES of America, Sidney Gottlieb, in His Individual and in His Official Capacities, Richard Helms, Individual and in His Official Capacities, and John Does, Unknown Agents of the Central Intelligence Agency, Defendants.

No. 83 CIV. 2458 (KMW).

May 18, 1995.

Sidney Bender, Leventritt, Lewittes & Bender, New York City.

Nancy G. Milburn, Asst. U.S. Atty., New York City.

OPINION & ORDER

KIMBA M. WOOD, District Judge.

*1 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, plaintiff appeals Magistrate Judge Buchwald's September 26, 1994 order denying

plaintiff leave to make a motion to compel defendants to produce certain documents in their unredacted form. For the reasons briefly stated below, I affirm the Magistrate Judge's order, which is appended to this opinion.

Following an in camera review of fifty unredacted documents designated by plaintiff, as well as of the declaration of William H. McNair, the Information Review Officer for the Directorate of Operations of the CIA, and of both the classified and unclassified declarations of R. James Woolsey, the Director of the CIA, the Magistrate Judge noted:

> [N]one [of the unredacted documents reviewed in camera] contain any reference to any experimentation conducted in France on or about October 1952. Of course, the possibility exists that a relevant piece of information might remain somewhere in the thousands of documents not included in this sample (as is the case any time a court reviews a sample of documents in lieu of the entire set). However, we have endeavored to eliminate this possibility by allowing plaintiff to choose the sample that was reviewed by the court, based on her view as to which documents would be the most advantageous to her case. As we have found no information in the documents to suggest that plaintiff was a victim of LSD research by the CIA, there is a solid basis to conclude that the other documents are irrelevant as well.

Order dated September 26, 1994, at pp. 8-9. The Magistrate Judge then made the following conclusions: (1) the CIA had a proper basis for invoking its statutory privilege, pursuant to 50 U.S.C. SS 403-3(c)(5) and 403(g); (2) the following arguments made by plaintiff were without merit: that the law of the case doctrine requires defendant to disclose the unredacted documents, and that sections 403(c)(5) and 403(g) do not establish a bar to civil discovery requests, but rather establish a bar only to requests made pursuant to the Freedom of Information Act, 5 U.S.C. S 552; (3) federal regulations implementing the CIA's Historical Review Program do not compel disclosure of intelligence sources or methods that can cause damage to national security; (4) the director of the CIA satisfied the procedural requirements involved in asserting the common-law state secrets doctrine; and, finally, (5) the redacted information, if disclosed, would pose a reasonable danger to the diplomatic relations of the nation. Based on these findings, the Magistrate Judge sustained defendants' refusal to provide plaintiff with the aforementioned unredacted documents.

Rule 72 of the Federal Rules of Civil Procedure and section 636(b)(1)(A) of the Federal Magistrates Act provide the standard for district court review of a Federal Magistrate Judge's order. Under both the rule and the statute, the standard to be applied depends on whether or not the Magistrate Judge's

order is dispositive. For nondispositive matters, a district court shall "modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a). Matters which are found to be dispositive, in contrast, are subject to de novo review by the district court. Fed.R.Civ.P. 72(b).

Pretrial discovery orders, such as the order contested in this case, are generally viewed as nondispositive, and thus are subject to the deferential "clearly erroneous" standard of review. See Thomas E. Hoar v. Sara Lee Corp., 900 F.2d 522 (2d Cir.), cert. denied, 498 U.S. 846 (1990). The Supreme Court has held that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); cf. Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 870 (2d Cir.1994). Upon a careful review of the Magistrate Judge's order, of the legal memoranda submitted by both parties, and of the unredacted documents at issue, I find that the Magistrate Judge's well-reasoned order is not clearly erroneous or contrary to law. [FN1] I hereby decline to modify or set aside any portion of that order.

SO ORDERED. May 15, 1995

/S/ Kimba M. Wood
U.S.D.J.

FN1. I find specifically that the Magistrate Judge's in camera review of fifty unredacted documents--selected by plaintiff--was an appropriate sample on which to base her findings. Moreover, plaintiff has not shown that the Central Intelligence Agency's inability to locate requested document no. 12 entitles her to an adverse inference as to the contents of that document, or that its absence has prejudiced her in any way. See, e.g., Berkovich v. Hicks, 922 F.2d 1018, 1023-24 (2d Cir.1991); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y.1991).

MEMORANDUM AND ORDER

BUCHWALD, Chief United States Magistrate Judge.

In this lawsuit, which was commenced on March 30, 1983, plaintiff Gloria Kronisch alleges that her now-deceased brother, Stanley Glickman, was one of the victims of a decade-long program to test human responsiveness to certain mind-altering drugs, in particular lysergic acid diethylanide ("LSD"), which was sponsored by the Central Intelligence Agency ("CIA") beginning in approximately 1950. Plaintiff's amended complaint states multiple causes of action against defendant United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. S 2671, and against defendants Sidney Gottlieb and Richard Helms, in their individual capacities and in their official capacities as former employees of the CIA, pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

*2 In the course of discovery, defendants produced approximately thirty thousand pages of documents, many of which were heavily redacted by the CIA on the basis of the statutory privileges established by the National Security Act of 1947, 50 U.S.C. S 403-3(c)(5), [FN1] and the Central Intelligence

Agency Act of 1949, 50 U.S.C. S 403g, and the state secrets privilege. In addition, a relatively small amount of information was redacted pursuant to the Privacy Act of 1974, 5 U.S.C. S 552a. The redactions were intended to protect information that defendants believe could reasonably be expected to reveal either (1) an intelligence source, method, or activity, or (2) CIA personnel, organization, or functions.

Plaintiff then sought leave of court to submit a motion to compel production of the redacted portions of some of the documents. Defendants opposed this application, contending that the redacted documents, in addition to being properly privileged, contain no information that is relevant to plaintiff's claim or that is reasonably calculated to lead to the discovery of admissible evidence. Defendants also sought permission to make a summary judgment motion.

On July 19, 1988, in an effort to assess the validity of the claimed privileges and the relevance of the redacted documents, the Court ordered the defendants to produce for in camera review the unredacted copies of any fifty documents as chosen by plaintiff. In addition, the Court ordered counsel for defendants, Assistant U.S. Attorney Nancy G. Milburn, to prepare an ex parte, in camera declaration explaining for each redaction (1) the meaning of the information; (2) the basis for the

privilege; (3) the impact of disclosure on national security; and (4) the reason that the privilege outweighs any arguable relevance (the "Milburn Declaration"). Based upon a review of the document sample and the Milburn Declaration, the Court intended to make a ruling on whether to grant plaintiff leave to make a motion to compel additional production.

On February 1, 1989, the Court requested that the parties submit memoranda of law concerning the various privileges asserted by defendants. The case then encountered a series of unfortunate delays largely beyond the Court's control that have prevented the resolution of this discovery dispute until the present time. On February 17, 1989, plaintiff dismissed his attorneys, Ramsey Clark, Lawrence W. Schilling, Peter B. Meadow, and James I. Meyerson, and proceeded to seek new counsel. When, after five months plaintiff had not obtained counsel, Judge Kimba Wood ordered on July 18, 1989 that the case be placed on the suspense docket. More than two years later, on November 25, 1991, Larry M. Lavinsky of Proskauer Rose Goetz & Mendelsohn entered a notice of appearance, and the case was thereafter removed from the suspense docket on January 8, 1992. Pretrial conferences were held with the parties on January 21, 1992 and February 26, 1992. At the later conference, plaintiff asked that the Court take no action with respect to the fifty

documents submitted for in camera review so that the parties could pursue a dialogue over possible declassification. [FN2] This dialogue was ultimately unproductive. Then, on December 11, 1992, plaintiff died, and the litigation again stood idle for a period of months. On July 29, 1993, plaintiff moved to substitute Gloria Kronisch, the executrix of the estate of Stanley M. Glickman, as plaintiff. In addition, plaintiff moved to substitute Sidney Bender of Leventritt Lewittes & Bender as new counsel. These motions were granted on August 30, 1993, and the case finally resumed at the stage where it had been suspended more than five years before.

*3 On November 24, 1993, the parties submitted simultaneous memoranda of law on the statutory and state secret privilege issues, and later, on January 12, 1994, submitted simultaneous answering memoranda. [FN3] Shortly thereafter, in light of news reports that President Clinton's National Security Council had prepared a draft executive order requiring the automatic declassification of secret documents more than twenty-five years old, [FN4] the Court wrote the parties on March 22, 1994 to express its concern that the CIA's original assessment of the need to preserve the secrecy of the redacted material might no longer reflect its current stance. Accordingly, the Court directed the CIA, inter alia, to submit a formal claim of privilege to justify the redactions on

the fifty documents that are the subject of the Milburn Declaration. On June 21, 1994, the CIA filed the following declarations in support of formal claims of privilege to protect secrets related to national security and intelligence gathering: (1) an unclassified declaration of William H. McNair, a CIA Information Review Officer (which asserts the statutory privileges under 50 U.S.C. SS 403-3(c)(5) and 403g); (2) an unclassified and a classified declaration of R. James Woolsey, Director of Central Intelligence (which assert the state secrets privilege); and (3) a classified declaration of Hugh E. Price, Deputy Director of Operations of the CIA (which also asserts the state secrets privilege). In sum, the CIA asserts one or both of the statutory privileges, 50 U.S.C. SS 403-3(c)(5) and 403g, with respect to all redactions. In addition, the agency bases its justification for sixty-three redactions contained in twenty-seven documents upon the state secrets privilege. [FN5]

BACKGROUND

In the late 1970s, following a major congressional investigation, thousands of documents entered the public record chronicling how the CIA used nonconsenting individuals during the Cold War to test the effects of various mind-altering drugs and therapies. The CIA conducted these surreptitious experiments until approximately 1963, both in the United States and abroad, first using the code name

of "Bluebird," then "Artichoke," and finally, beginning in 1953, "MKULTRA." It was hoped that this research would enable the United States to counter perceived advances by the Soviet Union and China in the use of mind control as an offensive military weapon. Although much is now known about the CIA's secret behavioral experiments, many details will likely forever remain a mystery. Most documents associated with Projects Bluebird, Artichoke, and MKULTRA were destroyed by the CIA in 1973 at the direction of defendant Helms, who was following the advice of defendant Gottlieb. [FN6] See generally Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S.Rep. No. 94-755, 94th Cong., 2d Sess., Book I, at 392-411 (1976) (commonly identified as the Church Committee Report); John Marks, The Search for the "Manchurian Candidate" (1979).

*4 Plaintiff's amended complaint, filed September 13, 1983, gives the following account of how Glickman allegedly became a victim of the CIA's subterfuge. In October 1952, Glickman lived in Paris, France pursuing a promising career as an artist. (Am.Compl. P 15.) One evening, Glickman was taken by an acquaintance to The Select Cafe, where he met a group of Americans now thought by Glickman to have been government agents. (Id. at P 17.) At the cafe, Glickman was pressured by one of the Americans, whom he now believes to have

been defendant Gottlieb, to have an alcoholic drink. (Id. at P 18.) Unbeknownst to Glickman, this drink was laced with LSD. (Id. at P 19.) After consuming the drink, Glickman began to experience symptoms typical of LSD, including a sense of unusual powers, a warping of distance, a melding of colors, and a difficulty with conversation. (Id. at P 23.)

The amended complaint further alleges that on November 11, 1952, Glickman was taken to the American Hospital of Paris by United States governmental agents, where he was subjected to drug and electroshock treatment. (Id. at P 25.) On November 13, 1952, Glickman checked out of the hospital against the advice of his doctor. (Id. at P 26.) Suffering from continued hallucinations, Glickman readmitted himself to the hospital two days later, where he remained until November 21, 1952 when he left with a friend's assistance. (Id. at P 27.) Glickman never returned to his former self following these events. Unable to pursue his career as an artist, he continued to suffer from severe mental distress and despondency for the remainder of his life. (Id. at P 28.)

Defendants deny that they possess any documents relevant to plaintiff's claim that he was the unwitting subject of a covert experiment by the CIA in France in 1952. Plaintiff, on the other hand, believes that the information redacted by the CIA--

both in the fifty documents at issue herein and the thousands of others for which a privilege has not yet been formally asserted--will contain the clues necessary to help prove that he was, in fact, a victim of the CIA's drug and electroshock tests, as alleged in the amended complaint. Having reviewed the procedural and factual history underlying this litigation, we now can consider the applicability of the privileges asserted by defendants.

DISCUSSION

At the outset, we should note that we have carefully examined each of the fifty documents and that, as defendants have consistently represented, none appears to contain any reference to any experimentation conducted in France on or about October 1952. Of course, the possibility exists that a relevant piece of information might remain somewhere in the thousands of pages of documents not included as part of this sample (as is the case any time a court reviews a sample of documents in lieu of the entire set). However, we have endeavored to eliminate this possibility by allowing plaintiff to choose the sample that was reviewed by the Court, based upon her view as to which documents would be the most advantageous to her case. As we have found no information in the documents to suggest that plaintiff was a victim of LSD research by the CIA, there is a solid basis to conclude that the other documents are irrelevant as

well. Therefore, as a practical matter, the result reached herein may have no actual impact on plaintiff's ability to assemble the evidence necessary to prove her case.

I. Statutory Privileges: 50 U.S.C. SS 403-3(c)(5) and 403g

*5 Section 403-3(c)(5) of Title 50 of the United States Code provides that the Director of the CIA shall "protect intelligence sources and methods from unauthorized disclosure." Operating in conjunction with Section 403- 3(c)(5), Section 403g adds that:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement 403-3(c)(5) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of ... any ... law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

The meaning and scope of the CIA's statutory privilege was the focus of the Supreme Court's decision in Central Intelligence Agency v. Sims, 471 U.S. 159 (1985), a case involving documents created as part of Project MKULTRA. Although

begun in 1953, Project MKULTRA evolved from the same behavioral research that is at issue in the current litigation. Because of its obvious similarity to the present case, Sims warrants close scrutiny.

The question presented in Sims was whether the CIA could properly invoke its statutory privilege under Section 403-3(c)(5) to deny a scholar's request, made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. S 552, for the names of the individuals and institutions that performed research in Project MKULTRA. Based upon the express language and legislative history of Section 403-3(c)(5), as well as "the harsh realities of the present day," id. at 174, the Court concluded that Congress had clearly intended for the CIA to have "sweeping power to protect its 'intelligence sources and methods.' " Id. at 170. Accordingly, the Court interpreted Section 403-3(c)(5) to vest the Director of the CIA with "very broad authority to protect all sources of intelligence information from disclosure." Id. at 168-69. "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored." Id. at 169-70.

The Court stressed that the statutory privileges are necessary to ensure that the CIA can provide informants with the type of absolute guarantee of confidentiality that is crucial to maintaining the intelligence-gathering apparatus. "[F]orced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission." Id. at 175. Indeed, if potential intelligence sources lose trust in the CIA's ability to protect their identities from public disclosure, or come to fear that a judge might some day order that their names be revealed, "many could well refuse to supply information to the Agency in the first place." Id.

*6 Significantly, "intelligence sources" does not simply refer to sources of secret intelligence information. Id. at 176. On the contrary, the Court specifically rejected the argument, adopted by the court of appeals, that the CIA could refuse to reveal the identities of only those sources who supplied information unattainable without guaranteeing confidentiality. Id. at 174. Rather, the Court held that "intelligence sources" included not only the "secret agents" of spy novel lore, but also "seemingly innocuous sources," such as "an obscure but publicly available Eastern European technical journal" to which the Agency subscribes. Id. at 176-77. A hostile state potentially could infer sensitive information about the general nature or scope of an intelligence program simply by

knowing of the publicly available material utilized by the CIA: "A foreign government can learn a great deal about the Agency's activities by knowing the public sources of information that interest the Agency. The inquiries pursued by the Agency can often tell our adversaries something that is of value to them." Id. Consequently, the Director, in exercising his authority under Section 403-3(c)(5), "has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source." Id. at 178.

Although Sims dealt with a request for the disclosure of intelligence sources, its reasoning has been applied with equal force in the context of intelligence methods. In Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755, 762 (D.C.Cir.1990), for example, the D.C.Circuit upheld a district court's decision to reverse its own pre-Sims disclosure order, even though the information at issue related to intelligence methods that the district court had earlier considered "so basic and innocent that its release could not harm the national security or betray a CIA method." 578 F.Supp. 704, 722 (D.D.C.1983). Based on Sims, the D.C.Circuit rejected the argument that intelligence methods that might generally be known must be disclosed. Fitzgibbon, 911 F.2d at 763.

Finally, before turning to plaintiff's specific arguments, we ought to reiterate the Supreme Court's admonition that judges, "who have little or no background in the delicate business of intelligence gathering," are ill-suited to make the "complex political, historical, and psychological judgments" about whether disclosure of a "source or method" may pose a bona fide threat either to an individual or, more generally, to the nation. Sims, 471 U.S. at 176. As a result, the discretion to make this determination rests not with the judiciary, but with the Director of the CIA:

> [I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

*7 Id. at 180. See also Maynard v. Central Intelligence Agency, 986 F.2d 547, 555 n. 6 (1st Cir.1993) ("The CIA, not the judiciary, is better able to weigh the risks that disclosure of such information may reveal intelligence sources and methods so as to endanger national security."); Fitzgibbon, 911 F.2d at 763 ("refining distinctions between and making comparative evaluations of veteran sources, new sources, unlikely sources and potential sources is a task to which judges and courts are unsuited"); Knight v. Central Intelligence Agency, 872 F.2d 660, 664 (5th Cir.1989) (holding

that, absent evidence of bad faith, a determination by the Director of Central Intelligence that a classified document could reveal intelligence sources and methods is "beyond the purview of the courts"); United States v. Yunis, 867 F.2d 617, 623 (D.C.Cir.1989) ("Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods.").

Plaintiff suggests three reasons that the CIA cannot assert its statutory privileges in the present case. First, plaintiff contends that under the law of the case doctrine, Judge Griesa's earlier decision denying various motions to dismiss, see Glickman v. United States, 626 F.Supp. 171, 175 (S.D.N.Y.1985), bars defendants from asserting any claims of privilege. According to plaintiff, a "necessary corollary to Judge Griesa's finding that the CIA's drug-testing program was illegal and unconstitutional is that plaintiff is entitled to meaningful discovery in order to establish her claims--discovery unobstructed by the CIA's contemptuous privilege assertions." (Pl.'s Mem. of Law at 18.) In support of this broad proposition, plaintiff cites the well-known case of Socialist Workers Party v. Attorney General of the United States, 458 F.Supp. 895 (S.D.N.Y.1978), vacated and remanded on other grounds sub nom. In re

Attorney General of the United States, 596 F.2d 58 (2d Cir.), cert. denied, 444 U.S. 903 (1979), which was also decided by Judge Griesa.

In Socialist Workers Party, Judge Griesa held the U.S. Attorney General in contempt for his failure to obey a court order directing the FBI to produce the files of certain paid informants. The files were suspected to contain evidence relevant to plaintiffs' claim that they were the victims of a systematic, covert campaign to disrupt their lawful activities. Among other allegations in the complaint, plaintiffs charged that the FBI had arranged for informants to infiltrate plaintiff political organizations in order to acquire confidential information that could be used to harass members. In ordering the files to be released to plaintiffs on an attorneys-eyes-only basis, Judge Griesa wrote:

> It is not only in plaintiffs' interest, but in the broad public interest, that plaintiffs be afforded a fair opportunity to obtain and present the essential evidence about this alleged wrongdoing. The issues in this case relate to the most fundamental constitutional rights, which lie at the very foundation of our system of government....

*8 Id. at 898.

In the instant case, Judge Griesa has similarly observed that plaintiff's complaint alleges constitutional wrongs of a "serious and malevolent

nature." Glickman, 626 F.Supp. at 175. Indeed, it seems fair to infer that the governmental misconduct alleged here is at least as heinous as the type alleged in Socialist Workers Party. Plaintiff therefore requests that the Court weigh the interests of the parties to the information, and, mindful that Judge Griesa's earlier decision represents the "law of the case," reach the same conclusion as Socialist Workers Party--namely, that due to the serious nature of the misconduct alleged in the complaint, plaintiff's need for the information must outweigh the competing governmental interest in maintaining secrecy.

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." DiLaura v. Power Authority of State of New York, 982 F.2d 73, 76 (2d Cir.1992) (internal quotations omitted). Because we are not revising any issue concerning the sufficiency of the complaint, we do not believe the law of the case has any applicability in the present context. However, it is a separate question whether Socialist Workers Party can offer any guidance to us for determining the validity of the privileges asserted here by defendants.

Socialist Workers Party did not involve any of the privileges under consideration in this case. At issue in Socialist Workers Party was the "informant privilege." Significantly, that privilege is not

absolute, meaning that the court must weigh the government's interest against other factors. See Roviaro v. United States, 353 U.S. 53, 60-61 (1957). In contrast, the privileges conferred by Sections 403-3(c)(5) and 403g are absolute. The court need only determine whether the privileges are properly asserted, not whether a weighing of the equities favors one side or the other. Thus, unlike Socialist Workers Party, we cannot ascribe significance to the grievous nature of the governmental misconduct alleged in the complaint, so long as we find that the CIA's justification for asserting its statutory privileges is sound. Whether this result is correct as a matter of public policy is surely open to debate. But that is a role for the legislative branch of our government, and not the judicial. Hence, we believe that plaintiff's reliance on Socialist Workers Party is misplaced.

The second argument advanced by plaintiff is that Sections 403-3(c)(5) and 403g do not bar civil discovery requests made pursuant to the Federal Rules of Civil Procedure ("FRCP"). (Pl.'s Mem. of Law at 21-31.) According to plaintiff, the CIA can assert the statutory privileges, if at all, only in order to block the mass publication of sensitive documents sought under the Freedom of Information Act. Plaintiff insists that Sims, which arose in the context of the FOIA, is a "far cry from the instant case" (id. at 23), and that defendants

have "flagrantly" ignored the distinction between the FOIA and the FRCP. (Id. at 25.)

*9 This argument too is unpersuasive. It is true that the great majority of cases involving the statutory privileges arise, like Sims, in the context of the FOIA. While we recognize that the factor of need may in some contexts enter into a disclosure analysis, it is impossible to reconcile Sims with an interpretation of the statutory privileges whereby their applicability merely depends on whether the suit is brought under the FOIA or not. Plaintiff's argument would undermine the CIA's ability to rely on the statutory privileges as a means to guarantee intelligence sources that their identities will forever remain confidential. [FN7] As the Supreme Court made emphatically clear in Sims, the language of Section 403-3(c)(5) suggests no limitation on its applicability: "The 'plain meaning' of S 102(d)(3) may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." Sims, 471 U.S. at 169. See also National Lawyers Guild v. Attorney General, No. 77 Civ. 0999, slip op. at 25 (S.D.N.Y. Aug. 1, 1983) ("the language and legislative history of SS 403(d)(3) and 403g indicate a congressional intent that these sections constitute a statutory privilege within the Federal Rules of Civil Procedure"); Elmquist v. Central Intelligence Agency, C.A. No. 82-0047, slip op. at 2 (D.D.C. June 8, 1982)

(rejecting argument that S 403g does not create a privilege under Rule 26).

Moreover, numerous courts have upheld the CIA's assertion of its statutory privilege in the context of civil discovery. See, e.g., United States v. Ferenc Koreh, 144 F.R.D. 218, 222 (D.N.J.1992); Hashemi v. Campaigner Publications, C.A. No. 83-0017, slip op. at 2 (D.D.C. June 10, 1983); National Lawyers Guild v. Attorney General, No. 77 Civ. 0999, slip op. at 25 (S.D.N.Y. Aug. 1, 1983); Elmquist v. Central Intelligence Agency, C.A. No. 82-0047, slip op. at 2 (D.D.C. June 8, 1982); Gelfand v. Smith, No. CV 79- 2710, slip op. at 2 (C.D.Cal. May 17, 1982); Neely v. Central Intelligence Agency, C.A. No. 79-3237, slip op. at 2 (D.D.C. Mar. 3, 1982); Heine v. Raus, 261 F.Supp. 570, 577-78 (D.Md.1966), vacated and remanded on other grounds, 399 F.2d 785 (4th Cir.1968). In addition, no court has ever struck down a claim of statutory privilege solely on the ground that Sections 403-3(c)(5) and 403g do not apply to civil discovery. We further note that Fed.R.Civ.P. 26(b) limits the scope of discovery to matters that are "not privileged" and that Fed.R.Evid. 501 likewise contains an exemption for privileges "provided by Act of Congress."

Plaintiff's third argument is that the CIA's own regulations--specifically, the regulations implementing the CIA's Historical Review Program

("HRP") [FN8] --require the disclosure of the information for which the statutory privileges are asserted. (Pl.'s Letter to the Court, dated June 21, 1994, at 1-4.) The CIA instituted the HRP on April 28, 1992 in an effort to accelerate the release of significant historical information to the public while safeguarding the national security interests of the United States. P a(1). Of particular importance, in plaintiff's view, is paragraph 8(e) of the HRP, which reads:

> ***10** In no case will information be kept classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; or to prevent or delay the release of information that does not require protection in the interest of national security.

Plaintiff suggests that the CIA is trying to do exactly what this paragraph prohibits, namely, to conceal a violation of law.

Putting aside the obvious fact that a federal agency's regulations cannot supersede a valid act of Congress, we would note that the HRP specifically states that all declassification and release of information must be consistent with

> [t]he responsibilities of the Director of Central Intelligence (DCI) under the National Security Act of 1947 and the CIA Act of 1949, as amended, to protect intelligence sources and

methods and organizational and personnel information.

a(2)(a). In addition, although the HRP contains many provisions designed to liberalize the standards for document declassification, the regulations continue to preserve the caveat that "the unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security." P e(4). Having read the full text of the HRP, we discern nothing in the regulation to alter the applicability of the privileges conferred by Sections 403-3(c)(5) and 403g. [FN9]

We have reviewed the unclassified declaration of William H. McNair ("McNair Declaration"), the Information Review Officer for the Directorate of Operations of the CIA, which asserts the CIA's statutory privileges. The McNair Declaration incorporates the Milburn Declaration by reference. Based on our review of the underlying documents, we are satisfied that the CIA has identified proper grounds for each redaction, and therefore, we uphold their statutory privilege claims. Finally, as for the various "public policy" considerations raised by plaintiff, we would simply respond that while we recognize that the documents at issue are approximately forty years old and that much information about Projects Bluebird, Artichoke, and

MKULTRA is already a matter of public record, we must ultimately defer to the CIA's considered judgment that disclosure of the redactions might jeopardize the lives of certain intelligence sources and their families, undermine the operation of the CIA, and cause serious damage to national security. (McNair Declaration PP 8-19.) [FN10]

II. State Secrets Privilege

"The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir.1991) (citing In re United States, 872 F.2d 472, 474 (D.C.Cir.1989)). The privilege may only be invoked by the government itself, and neither a private party nor an individual official may invoke its protection. Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C.Cir.1983), cert. denied, 465 U.S. 1038 (1984). The information protected by the privilege is not narrowly restricted to military affairs but also encompasses matters involving national defense, foreign policy, and foreign intelligence activities. See In re "Agent Orange" Prod. Liab. Litig., 97 F.R.D. 427, 430 (E.D.N.Y.1983); National Lawyers Guild v. Attorney General, 96 F.R.D. 390, 395 (S.D.N.Y.1982). "The various harms, against which protection is sought by invocation of the

privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." Ellsberg, 709 F.2d at 57 (citing cases). See also Halkin II, 690 F.2d at 991 ("the privilege extends to matters affecting diplomatic relations between nations").

*11 In United States v. Reynolds, 345 U.S. 1 (1952), the Supreme Court set forth three specific procedural requirements that the government must satisfy in order to properly invoke the state secrets privilege:

> There must be [1] a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, [3] after actual personal consideration by that officer.

Id. at 7-8. These requirements are not simply technical formalities. "Rather, their purpose is to insure that the privilege is claimed by someone in the executive branch with sufficient authority and responsibility so that the court can rely upon his judgment that the claim was prudently invoked." National Lawyers Guild, 96 F.R.D. at 396. Failure of an executive officer to comply with these requirements will bar the court from considering the government's privilege assertion. See Kinoy v. Mitchell, 67 F.R.D. 1, 9 (S.D.N.Y.1975).

Mere compliance with these procedural requirements does not conclude the judicial role. In addition, the court must assess the justification for the privilege claim, "satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security." Zuckerbraun, 935 F.2d at 547. "[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." In re United States, 872 F.2d 472, 475 (D.C.Cir.1989), cert. dismissed sub nom. United States v. Albertson, 493 U.S. 960 (1990). See also Reynolds, 345 U.S. at 9-10 ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."); Molerio v. Federal Bureau of Investigation, 749 F.2d 815, 822 (D.C.Cir.1984) ("To some degree at least, the validity of the Government's assertion must be judicially assessed.").

However, the scope of judicial review is quite narrow. As in the context of the statutory privileges, "the probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area." Ellsberg, 709 F.2d at 58 n. 31. See also United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) ("The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to

serve effectively in the review of secrecy classifications in that area."). Consequently, "although the privilege is not to be lightly invoked, the court must accord the 'utmost deference' to the executive's determination of the impact of disclosure on military or diplomatic security." Zuckerbraun, 935 F.2d at 547 (internal citations omitted). See also Ellsberg, 709 F.2d at 58 n. 35 (observing that courts, in assessing the probability that disclosure would cause injury to the military or diplomatic interests of the nation, have shown a "willingness to credit relatively speculative projections of adverse consequences").

*12 Turning to the present case, we find, as an initial matter, that the classified and unclassified declarations of R. James Woolsey, the Director of Central Intelligence, fully satisfy the procedural requirements for asserting the state secrets privilege. Plaintiff does not contend otherwise. However, plaintiff argues strenuously that the assertion of privilege cannot be sustained because (1) her critical need for the remaining documents militates for full and honest disclosure by the government, and (2) the redacted information poses no "reasonable danger" to national security. (Pl.'s Mem. of Law in Opp. at 34-40.)

A party's need for information withheld as a state secret is only relevant for determining "how far the court should probe in satisfying itself that the

occasion for invoking the privilege is appropriate." Reynolds, 345 U.S. at 11. See also Halkin II, 690 F.2d at 990 n. 54. When, for example, a party's entire case rests on the outcome of the motion to compel, then the court generally must make an in camera examination of the documents in question, as we have done here. See Ellsberg, 709 F.2d at 59 n. 37; American Civil Liberties Union v. Brown, 619 F.2d 1170, 1173 (7th Cir.1980). On the other hand, if the party seeking the information has made only a trivial showing of need, the court should evaluate the privilege assertions based solely on the government's public representations, without conducting an in camera examination. See Ellsberg, 709 F.2d at 59 n. 38.

However, "[o]nce the court is satisfied that the information poses a reasonable danger to secrets of state, 'even the most compelling necessity cannot overcome the claim of privilege.' " Halkin II, 690 F.2d at 990 (quoting Reynolds, 345 U.S. at 11). In other words, the court need not perform "a balancing of the ultimate interests at stake in the litigation." Id. Rather, the appropriate inquiry is "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." Id. See also Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C.Cir.1984) (a "party's need for the information is not a factor in

considering whether the privilege will apply"); Clift v. United States, 808 F.Supp. 101, 106 (D.Conn.1991) ("Once the privilege is successfully invoked, it is absolute."); In re "Agent Orange" Prod. Liab. Litig., 97 F.R.D. at 430 ("the state secrets privilege is absolute and will not be overcome by a demonstration of litigative need"); National Lawyers Guild, 96 F.R.D. at 399 ("once the court is satisfied that the material implicates military or state secrets, it is absolutely privileged from disclosure").

We recognize that the government's use of a classified declaration to assert the privilege places plaintiff in the difficult position of having to rebut an argument the precise contours of which are unknown. Likewise, in evaluating assertions of the state secrets privilege, a court often faces the uncomfortable situation of having to issue a ruling without being able to give a full explanation of the underlying rationale. As before in the context of the statutory privileges, we have considered the fact that the documents are approximately forty years old and that much of the information contained therein is now a matter of public record. However, mindful of the Second Circuit's instruction that judges must apply the "utmost deference" when reviewing an executive officer's formal claim of the state secrets privilege, we are satisfied that the redacted information would pose, if disclosed, a reasonable danger to the diplomatic relations of the

nation. On this basis, we sustain the state secrets privilege with respect to each redaction to which the privilege is applicable.

CONCLUSION

*13 Defendants' privilege assertions are sustained as to the fifty documents, and plaintiff is denied leave to make a motion to compel additional production. Further, while leave is granted to defendants to make a motion for summary judgment, the parties should confer about the scheduling of the motion in relationship to any appeal from this Order.

IT IS SO ORDERED. September 26, 1994

Naomi Reice Buchwald
Chief Magistrate Judge

FN1. Until 1993, the statutory privilege now contained in 50 U.S.C. S 403-3(c)(5) was codified at 50 U.S.C. S 403(d)(3). Many of the cases cited

herein refer to the latter. The recodification did not affect the substance of the statute.

FN2. Plaintiff's renewed attempt to persuade the CIA to produce unredacted copies of the documents was prompted by an announcement on February 21, 1992 by CIA Director Robert M. Gates that the agency intended to accelerate the declassification of many archives as part of a new "openness" plan. Specifically, Director Gates indicated that the CIA would establish a historical review unit to review the classification status of all documents more than thirty years old and of all documents from the late 1940s to the early 1960s thought to be of particular historical interest. See Elaine Sciolino, C.I.A. Director Announces Plan for More Access to Agency Files, N.Y.Times, Feb. 22, 1992, at A9.

FN3. The Court also received and considered correspondence from plaintiff dated May 4, 1994, June 21, 1994, July 13, 1994, July 22, 1994, and August 3, 1994, and correspondence from defendants dated April 25, 1994, May 6, 1994, July 6, 1994, and August 1, 1994.

FN4. See Tim Weiner, U.S. Plans Overhaul on Secrecy, Seeking to Open Millions of Files, N.Y.Times, Mar. 18, 1994, at A1, B6.

FN5. The CIA has also asserted a privilege pursuant to the Privacy Act for a small number of redactions. Based on the conclusions reached below with respect to the statutory and state secrets privileges, it is unnecessary to consider the CIA's claim concerning the Privacy Act.

FN6. By way of biographical background, defendant Gottlieb was the Director of the Chemical Division of the Technical Services Staff during the Cold War, which was the unit of the CIA primarily responsible for studying the effects of psychoactive drugs on human behavior. Defendant Helms was the CIA's Deputy Director of Research when Project MKULTRA began in 1953. In 1966, Helms became the Director of Central Intelligence, a position that he held until 1973.

FN7. We might also note that, in light of Sims, it is difficult to understand how plaintiff could contend, in good faith, that "there is no sources and methods privilege, as a general matter, where disclosure of sensitive information is involved." (Pl.'s Answering Mem. of Law at 13.)

FN8. The regulations are identified as "HR 70-14."

FN9. Plaintiff's letter of June 21, 1994 also directs our attention to the Protection and Reduction of Government Secrecy Act, Pub.L. No. 103-236, 108 Stat. 382, which was passed by Congress on April 30, 1994, and to proposed changes to the current executive order on the classification and declassification of national security information, Exec.Order No. 12356, 47 Fed.Reg. 14874 (1982), which have been reported by the news media. Although it seems evident that both the Clinton Administration and Congress are actively considering ways to reduce the amount of information that is kept classified, we can find no language that limits the CIA's ability to assert its privileges pursuant to Sections 403-3(c)(5) and 403g.

FN10. In addition, the "public policy" arguments advanced by plaintiff have not found acceptance in the courts. See, e.g., Maynard, 986 F.2d at 555 n. 6 (disagreeing with the argument that "merely because the information here is thirty years old, it cannot detrimentally reveal intelligence sources and methods"); Fitzgibbon, 911 F.2d at 763 (rejecting contention that district court was "under an obligation to consider the effect of the passage of time on the documents in question"); Afshar v. Department of State, 702 F.2d 1125, 1130-31 (D.C.Cir.1983) ("[E]ven if a fact ... is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security. Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government to retaliate."); Halkin v. Helms ("Halkin II "), 690 F.2d 977, 994 (D.C.Cir.1982) (quoting Military Audit Project v. Casey, 656 F.2d 724, 752 (D.C.Cir.1981)) (rejecting "the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified' or otherwise privileged from disclosure"); Sirota v. Central Intelligence Agency, No. 80 Civ. 2050 (S.D.N.Y. Sept. 18, 1981) (LEXIS, Genfed library, Dist file) ("the fact that some information has been made public, whether accurate or not, does not require the release of additional information that this Court has determined to be exempt from disclosure"). But see United States v. Ahmad, 499 F.2d 851, 855 (3d Cir.1974) ("The passage of time has a profound effect upon [matters of national security], and that which is of the utmost

sensitivity one day may fade into nothing more than interesting history within weeks or months.").

END OF DOCUMENT

APPENDIX G

NAOMI REICE BUCHWALD
CHIEF MAGISTRATE
JUDGE

March 22, 1994

Nancy G. Milburn, Esq.

Sidney Bender, Esq.

Re: Kronish v. United States
83 Civ. 2458 (KMW)

Dear Counsel:

As you are both no doubt aware, President Clinton and Congress are actively considering major changes in procedure and philosophy concerning the classification and declassification of Government records. As noted in a recent article in The New York Times on March 18, 1994, the proposed order of the National Security Counsel would require the automatic declassification of secret documents after twenty-five years and only agency heads could block the release of documents of that vintage. An earlier proposal would have declassified documents over forty years old.

While I recognize that there will remain legitimate reasons for non-disclosure of older documents, nonetheless, the adoption of any of the proposals under consideration would apparently change the presumption concerning the validity of classification. Thus, without initimating this Court's view of the merits of the numerous arguments submitted, if the determination of the privilege issue proceeded in its present posture, i.e., without the CIA asserting a formal claim of privilege, the Court might well be applying a different, and arguably harsher, standard than would the CIA itself. Having reviewed the documents once, this Court cannot be certain that an analysis by the CIA in which age is a primary factor would not result in the release of information currently withheld. Thus, having the Court perform a privilege analysis without the benefit of a current, high level appraisal by the CIA, arguably might not serve the interests of justice, which militate in favor of maximum disclosure consistent with legitimate security concerns.

Accordingly, I have determined, given the significant modifications of declassification methodology under active consideration for some time, that the original procedure arrived at four years ago is no longer an appropriate one for resolving the privilege issues in this case. Thus, I am directing that the CIA submit a formal claim of privilege for any document it has previously

withheld in this case. The Court trusts that the Director of the CIA will consider the "winds of change" and not maintain positions which would be negated within months by executive order or legislation. The formal claim of privilege with respect to the documents which are the subject of the Milburn Affidavit should be submitted within thirty days of the receipt of this directive. Counsel should discuss a timetable for consideration of the remaining documents by the CIA.

Very truly yours,

/s/
NAOMI REICE BUCHWALD
Chief Magistrate Judge

APPENDIX H

17 Stuyvesant Street

3 October 1977

Mr. Robert S. Young
Freedom of Information Coordinator
Washington, D.C. 20505

Dear Sir:

This is a request under the Freedom of Information Act as amended (5 U.S.C. 552).

I write to request a copy of all files in the Central Intelligence Agency indexed or maintained under my name and all documents containing my name. To assist you in your search, I have indicated my place and date of birth below my signature.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve the right to appeal any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemptions you believe covers the information which you are not releasing.

If you have any questions regarding this request, please write me at the above address.

As provided for in the amended Act, I will expect to receive a reply within ten working days.

Sincerely yours,

Stanley Milton Glickman
Born: 1 February 1927
Brooklyn, New York

APPENDIX I

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

28 December 1977

Stanley M. Glickman

Dear Mr. Glickman:

Subsequent to our telephone conversation of 20 December 1977, I was informed by one component that they have located some references containing your name. The references concern an individual who served as a communicator in the OSS which he joined in July 1944.

Please advise me if you are that individual and I will finish the processing of your request.

Sincerely,

Gene F. Wilson
Information and Privacy Coordinator

APPENDIX J

17 Stuyvesant Street
New York 10003 New York

6 January 1978

Mr. Gene F. Wilson
Freedom of Information Coordinator
Central Intelligence Agency
Washington, D.C. 20505

I, Stanley Milton Glickman am not that individual who served as communicator in the offices of the OSS.

The above statement is in answer to your letter of 28 December 1977.

Sincerely,

Stanley Milton Glickman

APPENDIX K

CENTRAL INTELLIGENCE AGENCY
Washington D.C. 20505

January 26, 1978

Mr. Stanley M. Glickman

Dear Mr. Glickman:

This is in response to your letter dated 3 October 1977, wherein you requested copies of all documents pertaining to you which may be contained in the files of this Agency. In processing your request, a card was located with a notation that a Stanley Glickman from Illinois, no date of birth given, was sent employment information in September 1976. Said Mr. Glickman did not reply.

Please be advised, if you are that person, that this is the only information located which may pertain to yourself.

Sincerely,

Gene F. Wilson
Information and Privacy Coordinator

APPENDIX L

17 Stuyvesant Stuyvesant Street
New York, 10003 New York
30 Janaury 1978

Gene F. Wilson
Freedom of Information Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Dear Sir:

I, Stanley Milton Glickman AM NOT that individual from Illinois, who received employment information in 1976.

The above statement is in answer to your letter of 26 Janaury 1978.

As an aid to your search I will sepcify that Paris France in the 1950's is the area for you to focus upon.

Sincerely yours,

Stanley Milton Glickman

APPENDIX M

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

10 February, 1978

Mr. Stanley Milton Glickman
17 Stuyvesant Street
New York, N.Y. 10003

Dear Mr. Glickman:

This is in response to your letter dated 30 January 1978, wherein you state that you are not the person who received employment information from this Agency. As I mentioned to you in a previous letter, there was a reference to a Stanley M. Glickman who served in the OSS. You later informed me that you were not that individual.

The search of our records has been completed and, with the exception of the aforementioned reference, we have been unable to locate any other record of a Stanley Milton Glickman.

Sincerely,

Gene F. Wilson
Information and Privacy Coordinator

APPENDIX N

17 Stuyvesant Street
New York, N.Y. 1977
11 October 1977

Senator Edward Kennedy

Dear Sir:

I write you this letter because of your participation in the Senate hearings on C.I.A. drug experimentation on unsuspecting persons in the 1950's.

I understand at that time, neither the person given the drug, or the medical community could have understood the produced reaction.

I believe it is possible there might be persons in a continuing madness of twenty five years, that should be informed.

If this Senate body does not judge to inform these persons; then the Senate must take responsibility for the continuing torture of those persons.

Sincerely yours,

Stanley Milton Glickman

APPENDIX O

November 1, 1977

Mr. Stanley Milton Glickman

Dear Mr. Glickman:

Thank you for you recent letter concerning CIA drug experimentation.

I share your concern in this matter. Unfortunately neither the CIA nor the Senate Subcommittee has been unable to determine to date the identities of the persons involved in the unsuspecting testing. This is principally due to the fact that the records concerning these tests were destroyed in 1973.

The Director of the CIA testified at a recent subcommittee hearing that he would confer with the Attorney General of the United States in an attempt to determine whether there was any way any of these persons could be identified so that a follow-up program could be devised.

I appreciate your interest and concern.

Sincerely,

Edward M. Kennedy

APPENDIX P

17 Stuyvesant Street

28 January 1978

Senator Edward Kennedy

Dear Sir:

My continued interest in the subject of CIA drug experimentation on unsuspecting persons in the 1950's is due to my belief, that I AM ONE OF THOSE PERSONS.

3 October 1977 I applied to the CIA for my personal records. I have called and spoken three times with Mr. Gene Wilson, CIA Information and Privacy Coordinator. Our last conversation on 20 December 1977 was spent informing me of the difficulty in collecting distant records. I have inclosed a copy of my initial request.

Due to the unusual and urgent reasons I seek this information I now request you service, help and advice.

Sincerely,

Stanley Milton Glickman

APPENDIX Q

17 Stuyvesant Street
New York, 10003 New York
11 October 1977

Senator Jacob Javits
Human Resources subcommittee on health
United States Senate office building Suite 4230
Washington, D.C. 20510

Dear Sir:

Inclosed are fifteen copies of a letter I have written to Senator Edward Kennedy as chairman of the Senate Human Resources subcommittee on health.

as Senator from the State of New York, and member of this subcommittee I should like you to have a copy of this letter and consider my views.

I would appreciate your distribution of the other copies to the fourteen other Senators on this committee.

Thank you,

Stanley Milton Glickman

APPENDIX R

9 November 1977

Attorney General of the United States
Mr. Griffen Bell
Department of Justice
Washington, D.C. 20530

Dear Sir:

Inclosed are copies of my correspondence with Senator Edward Kennedy, and the Central Intelligence Agency, Freedom of Information Coordinator. They relate to each other by the fact, I believe myself to be one of those unsuspecting persons involved.

October 21 1977 I spoke with Gene Wilson, the subject of our conversation was to determine the length of time it would take to receive the requested information. He informed me it could take from two to six months.

It does not seem unrealistic to me, that anyone trying to uncover information this agency has tried to suppress, might be in physical danger.

I request your advice and help to hasten receipt of my C.I.A. records and protect my life.

Sincerely yours,

Stanley Milton Glickman

APPENDIX S

December 7, 1977

Mr. Stanley Milton Glickman
17 Stuyvesant Street
New York, New York 10003

Dear Mr. Glickman:

This is in response to your letter of November 9, 1977, addressed to the Attorney General of the United States, in which you requested "advice and help" to hasten receipt of records you have requested from the Central Intelligence Agency (CIA). Your letter was referred to my office on November 17, 1977. I regret the delay in responding.

The Department of Justice does not have the authority or the responsibility for ensuring that other agencies in the executive branch respond to requests for information under the Privacy Act (5 U.S.C. § 552a).

Your concern notwithstanding, this appears to be a routine Privacy Act request. There do not appear to be any unusual questions or issues which require an inquiry by the Attorney General , either as to the nature of the request, or

as to the reason and nature of the projected delay in responding.

Nevertheless, if you are convinced that the delay is unwarranted, I suggest that you review the CIA regulations (32 C.F.R. Part 1900) as well as the Privacy Act itself to determine what legal or administrative remedies might be appropriate.

Sincerely,

Harry L. Gastley
Administrative Counsel

APPENDIX T

AARON TENENBEIN, being duly sworn, deposes and says:

I am Professor of Statistics and Actuarial Science and Chairman of the Department of Statistics and Operations Research at Stern School of Business at New York University. Attached is my curriculum vitae. I submit this affidavit at the request of the attorneys for the plaintiff, Leventritt Lewittes & Bender, in support of their motion to file objections to Chief Magistrate Judge Naomi Reice Buchwald's September 26, 1994 memorandum and order.

I am providing this affidavit with regard to the statistical aspects of the sample of 50 documents drawn in the above referenced litigation. The court reviewed the 50 documents in unredacted form, the purpose of which was to find information "to suggest that plaintiff was a victim of LSD research by the CIA"

It is alleged that Stanley Glickman, without his knowledge or consent, was given an alcoholic drink laced with LSD by CIA agents in Paris, France on or about October 1952 and was thereafter taken to the American Hospital in Paris during November 1952, where he was treated as a patient.

The sample of 50 documents was drawn from a larger group of documents, numbering from 5,000 to 10,000. This larger group is sometimes referred to as the frame. The following two incidents occurred:

a. Defendants claim that one of the documents could not be located. Another document was substituted by the defendants.

b. None of the 50 documents was found pertinent by the Court [in the sense that there was no information in the documents to suggest that plaintiff was a victim of LSD research by the CIA].

These two results raise two important statistical issues, namely:

1. Is it statistically valid to replace a missing document?

2. Is a random sample of 50 sufficient in order to have a high degree of probability of detecting a pertinent document, if, it does exist in the larger group or frame?

The answer to both of these questions is NO. I will elaborate on each point.

1. It is statistically valid to replace a document for one missing in the sample? NO.

In order to be statistically valid, a probability sample must be drawn. In other words, the sampling must be done at random, so that the probability or likelihood of drawing any document from the frame is known in advance. In the case of simple random sampling, each document in the frame has the same chance of being selected into the sample. By carrying out the sampling, in this way, we can determine the probability of detecting a pertinent document.

The plaintiff's previous attorneys drew the sample. It is not known how they selected the sample. However, since the documents were in redacted form, the attorneys had no special knowledge as to the contents of the redacted material which they could use to aid them in searching for the pertinent documents. Hence the assumption of a random sample is reasonable.

In statistical practice, information on some of the units being sampled (in this case documents) may not be obtained. This is commonly known as non-response error. If this does happen, the tendency for people unfamiliar with statistical practice is to replace missing units by others which are available. When this replacement is carried out, the assumption of probability sampling is violated.

This is not an accepted statistical practice. There is no justification for this procedure because the reason why information is not available may be strongly related to the kind of information which the missing unit contains. In this particular situation, it can be inferred that the document is missing because there is a strong likelihood that it is pertinent. If it were pertinent, then the estimated percentage of pertinent documents in the frame would be 2% (1 out of 50 equals 2%). This would imply that the estimated number of pertinent documents in a frame of size 5,000 would be 100 (2% of 5,000).

2. Is a random sample of 50 sufficient in order to have a high degree of probability of detecting a pertinent document, if, in fact, it does exist in the larger group or frame? NO.

Even if the problem of the missing document did not exist, a random sample of 50 is not sufficient. Table 1 shows the reason. In this table the probability of detecting at least one pertinent document in the frame is calculated under several scenarios:

a. The number of documents in the frame varies from 5,000 to 10,000.

b. The number of pertinent documents in the frame varies from a low of 1 to a high of 20.

As can be seen from the table, the probability of detecting at least one pertinent document if there were as many as 20 pertinent documents in the frame, is under 20% (18.24%). This probability becomes much lower (under 4.90%) if the number of existing pertinent documents in the frame is at most 5.

As a result, a sample of 50 is insufficient because it simply has a very low probability of detecting a pertinent document if it existed in the frame.

In order to be more reliable, the probability of detecting a pertinent document should be much higher, certainly above 90%. Table 2 gives the values for the number of documents which must be sampled to yield a probability of 95% of detecting a pertinent document. As can be seen, a sample of 1294 is required if the number of pertinent documents is 10 out of 5,000.

All of the computations in Tables 1 and 2 have been carried out under the assumption that the manner in which plaintiff's attorneys selected the sample is equivalent to simple random sampling. If in fact this assumption is not valid, the detection probabilities and the required sample sizes as calculated in the tables, would take on different values which are unpredictable. Without any additional information there is no way to determine

what the correct values should be for the detection probabilities and the required sample size. If one were to reject the assumption of random sampling, which I made, the only other alternative is to examine all the documents in the frame.

WHEREFORE, the sampling carried out does not satisfy the aims of the study, namely:

1. Replacing a missing document is statistically invalid. The fact that it is missing leads to the statistical inference that there is a strong likelihood of it being pertinent.

2. The probability of detecting a pertinent document, if it exists, is much too low.

By: /s/
Aaron Tenenbein

Sworn to before me this
18th day of November, 1994

/s/
Notary Public

APPENDIX U

United States Attorney
Southern District of New York

June 21, 1994

Honorable Naomi Reice Buchwald
United States Magistrate Judge

Dear Judge Buchwald:

Your Honor's March 22, 1994 letter to counsel in the above referenced action, *inter alia*, directs the Central Intelligence Agency ("CIA") to submit a formal claim of privilege for the fifty documents that are the subject of the Milburn declaration. Pursuant to the order, the CIA today filed four declarations: an unclassified declaration of William H. McNair ("McNair"), a CIA Information Review Officer, which asserts the statutory privileges under 50 U.S.C. §§ 403-3(c) (5) and 403g, an unclassified and a classified declaratioon of R. James Woolsey, Director of Central Intelligence ("DCI"), in support of the United States' Director of Central Intelligence ("DCI"), in support of the United States' claim of state secrets, and a classified declaration of Hugh E. Price, Deputy Director of Operations ("DDO") of the CIA, in further support of the United States' claim of state secrets. The unclassified declarations

of McNair and DCI Woolsey have been filed with the Court and copies served by hand on plaintiff's counsel. Courtesy copies for the Court are enclosed. The Government has filed and served on plaintiff's counsel a notice of filing *exparte in camera* declarations stating that the classified declarations of DCI Woolsey and DDO Price and the Milburn Declaration are being stored by the United States Attorney for the Southern District of New York and are available for the Court's review upon request.

The information contained in the classified declarations of DCI Woolsey and DDO Price is calssified at the Secret level and, therefore, pursuant to Executive Order 12356 and CIA regulations promulgated thereunder, the declarations must be stored in a CIA-approved safe, locked within a CIA-approved vault. The nearest such facility to the U.S. Courthouse is the CIA-approved safe located in the U.S. Attorney's Office vault, at One St. Andrew's Plaza. To prevent access by unauthorized persons, the declarations must be stored in that safe overnight, and at all other times when they are not in Your Honor's actual custody and possession. In addition, due to the classified nature of the materials, they may only be removed from the safe and transported to and from Your Honor by CIA personnel, or by non-CIA personnel who have been cleared by the CIA to the appropriate level. Finally, the declaration must be

transported and stored in the sealed, double-wrapped manner in which Your Honor will receive them.

In view of these security requirements, I propose the same arrangement for delivery and retrieval of the Woolsey and Price declarations to and from the Court that the Court has used for the Milburn declaration. The proposed arrangement is as follows: upon being advised on a given day by Your Honor's chambers that Your Honor wishes delivery or retrieval of the declarations at a designated time, I will either deliver or retrieve the materials myself, or, in the event that I am unavailable at the designated time, will arrange for the Records Manager of the U.s. Attorney's Office, who has the appropriate clearance, to do so.

Respectfully,

MARY JO WHITE
United States Attorney

By: /s/
NANCY G. MILBURN
Assistant United States
Attorney

APPENDIX V

United States Attorney
Southern District of New York

July 7, 1994

Sidney Bender, Esq.

Dear Mr. Bender:

I write in response to your June 28, 1994 letter. The fifty unredacted documents submitted to the Court for its *in camera* review are plaintiff's documents nos. 1 through 11 and 13 through 51. The CIA could not locate an unredacted copy of plaintiff's document no. 12, and, therefore, it substituted plaintiff's document no. 51. (Plaintiff submitted a total of 53 documents.) With that single exception, the documents submitted to the Court are in the same order as plaintiff's documents nos. 1-50. (You will note that the attachment to the Declaration of William H. McNair, dated June 16, 1994 (the "McNair Declaration"), omits any reference to document no. 12 and includes a reference to document no. 51.)

We will provide you with a copy of the fifty redacted documents in which the redactions are identified by number corresponding to the attachment to the McNair Declaration. The

numbering of this set is being done now, and you should receive it by the end of next week.

The CIA has asserted formal claims of privilege for all the redacted information in the fifty documents. Several redactions on a single document have the same number, which accounts for the discrepancy you noted in the last paragraph of your letter.

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/
NANCY G. MILBURN
Assistant United States
Attorney

APPENDIX W

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

* * * *

The personnel records that are the subject of this motion were responsive to plaintiff's longstanding discovery request for documents reflecting defendant's foreign travel. The CIA, when still a party to the case, originally withheld the the records under statutory and common law privileges, but, following the Second Circuit's decision, declassified and produced the records to plaintiff in November 1998 and January 1999.

* * * *

APPENDIX X
Voir Dire Transcript 1316
Dr. Klein

Q. Doctor, have you treated anyone who was given LSD without their knowledge?

A. I never treated anyone for that. I observed that once.

Q. Describe that situation.

A. Actually, it was a friend of mine and their maid was acting peculiarly, and it surprised them. So the friend just asked me to take a look at the maid who had been perfectly OK, and just that day started behaving oddly. And she was sort of fearful and upset.

This was, again, early '60s, I would say. And we asked if she had taken any LSD and anything like that. And she said no, she hadn't but that she intended to and she was going to go to a party with some friends of hers and take the LSD.

And we had asked if she had been with her friends and she said yes. And I didn't call them up, but my friend called them up and asked if they had slipped her some LSD, and they said yes, so we were able to tell her this was what was going on and just observed her for – I didn't observe her, but my

friend observed her. And she was OK in a few days.

Q. Doctor, aside from that experience and the earlier experience that you described treating people who have taken LSD along with a number of other drugs, tell us what informs your knowledge about LSD additionally.

A. LSD was a tremendously important and exciting subject for research psychiatry because there was – we didn't know what made people psychotic and one possibility was that they were making their own LSD, because very tiny amounts of LSD, a millionth of a gram would suffice to derange somebody, at least temporarily. So that many, many people were studying LSD to see if it would give some insight into naturally occurring pyschosis.

So naturally, because I was interested in psychosis and diagnosis and treatment, I read a great deal -- I don't know how many -- papers and books about LSD to keep current. After a while they found, of course, that LSD couldn't do that because LSD has tremendous tolerance associated with it, it stops hitting you. So that the idea that the body is making its own LSD couldn't account for a chronic psychosis.

Dr. Klein

Q. What does the term "differential diagnosis" mean?

A. As I tried to explain before about diagnosis, in psychiatry, we don't have objective laboratory tests. We may be getting there with some of the brain scans that we do nowadays, but we don't have it yet. Therefore, what you do, when you have a patient, you compare them, all of their symptoms, their course, treatment, response to treatment to this ideal treatment that you have of a particular diagnosis, what we call a prototype, a specific.

And the patients have not read the books so, to some degree, they are close to one and to some and they are not close to another. And what you do, in a differential diagnosis is, you weigh the various aspects of the patient and you say, well, on this hand it looks a little more like that and on this hand it looks a little more like this, and you put it all together and you come to a differential diagnosis and you make a list of the various things that the person might have that are very likely, and you have to come down somewhere and you say, I think they have A, not B.

Q. What do you mean that the patients have not read the books?

A. Well, the books make it sound like patients are nice and simple, that they are all about that and this. That's not true. Patients are very variable and often very puzzling.

* * * *

Q. Doctor, have you ever written any articles on LSD or any other psychedelic?

A. I have written articles on what they refer to as polydrug abusers who have LSD as polydrug abusers, but not specifically LSD, no.

Q. The polydrug abusers that you were talking about was a study that you did at Hillside Hospital where the people had taken many, many drugs and sometimes they also took LSD with those drugs, isn't that right?

A. Correct.

Q. So that you never came to a situation, as far as your experience during that and in connection with the article that you wrote, that concerned a diagnosis of people who just took LSD, isn't that right?

A. That's right.

Dr. Klein

Q. It is also true, is it not, Doctor, that in your private practice, the only time that you saw a patient who had been given LSD was the single instance that you cited where it was a maid of a friend of yours?

A. Yes. It wasn't my private practice either. It was juat a friend.

Q. How long did you see that patient, Doctor?

A. A few days.

Q. How many days?

A. I saw her over a few days independently, but I knew about her for sometime thereafter.

Q. Doctor, that patient never had any hallucinations, did she?

A. I don't believe so

Q. And no delusions?

A. No, not at all.

Q. Isn't it true, Doctor, that LSD is not part of your specialty as far as pharmacology is concerned?

A. No, not at all. It certainly is part of my specialty.

Q. Pardon me?

A. It is certainly part, insofar as I am a psychopharmacologist and I study all of the drugs that affect the mind so that I have it in perspective, I study LSD thoroughly.

Have I actually seen patients given LSD? Since 1966 that has been impossible; there is nobody that can use LSD. The vast majority who claim to be experts have never seen anyone on LSD except clinical patients or have read about it. I'm as expert as they are.

Q. Doctor, were you asked this question and did you give this answer on your deposition at page 105:

"Q. Is LSD part of your specialty as far as pharmacology is concerned?

1325

"A. Not really because, as you know, LSD was ruled by the federal government as being an inadmissible substance, at the same level with heroin so that there have been no treatment studies of LSD since, I guess, the mid-'60s, so that is really out of my ken."

A. By that I mean out of my experimental ken.

Q. "Q. And do I understand, when you say that is really out of your ken --

"A. In the sense that I haven't experimented with the drug. I haven't studied its effects, its toxicity or addictional, and that my knowledge of it is knowledge that somebody can read about, primarily, the toxicity of the drug when given under unsupervised circumstances."

Were you asked those questions and did you give those answers?

A. I certainly did, but what I meant by that was --

* * * *

So the answer is yes, Doctor?

A. Yes.

Q. The maid that you referred to before, she was told that she had gotten LSD shortly after the incident, isn't that right?

A. I guess about 24 hours after.

* * * *

Q. Doctor, have you ever been referred any patient by another psychiatrist for the treatment of LSD?

A. For the treatment of polydrug abuse including LSD?

Q. Not polydrug abuse. Would you define that?

A. Certainly. Polydrug abuse is the tendency of persons to take multiple and addictive drugs. So you would have somebody who used LSD on a regular basis that also used marijuana, alcohol, cocaine -- you name it.

Q. That does not permit you to give a diagnosis of just solely LSD, isn't that correct?

A. That's correct.

Q. Pardon me?

A. Certainly not.

Q. You cannot do it?

A. I cannot do a specific diagnosis except for LSD as a participant in the ongoing process.

Q. With other drugs?

A. Correct, sir.

Q. Do you hold yourself out to professional psychiatrists as an expert on psychedelic drugs?

A. Yes, I do.

Q. You do?

A. Yes, sir.

Q. Have any doctors ever referred any patient to you?

A. For psychedelic drugs?

Q. For psychedelic drugs?

A. As it occurs in a natural state as a polydrug abuser?

Q. Without being a polydrug abuser. Have any doctors ever referred any patient to you for a differential diagnosis solely for the use of LSD?

A. Such patients are so rare that practically nobody has ever seen them.

Q. So the answer is no?

A. The answer is no.

* * * *

APPENDIX Y

Sidney Gottlieb Transcript 1629

A **** Sometimes my own immediate superiors would be informed and sometimes, for security reasons, they would not. ****

APPENDIX Z

William McNair Deposition
(Part of *in limine submission*)

Q. Can you now tell me of your perosnal knowledge who inserted the date 1953 on that first line after November 5, the handwritten notation 1953?

A. No, I do not know who wrote it. * * * *

* * * *

Q. And you do not know who wrote the 1954 after the July 17 date on the next line; isn't that correct?

A: I do not know who wrote it but it coincides with his age and the date.

* * * *

Q. But you weren't there and you don't know who wrote it and when it was written in?

A. I was not there, did not see anyone write it.

APPENDIX AA

It is hereby stipulated and agreed by the parties to the above-captioned action that:

On November 18, 1953, seven civilian scientists from the Army and C.I.A.'s Technical Services Division were given LSD in a drink without their knowledge as part of a C.I.A. experiment involving LSD. The incident occurred at a government retreat in Maryland, which was attended by the seven scientists and three other Army and C.I.A. scientists. The drug was placed in a bottle of liqueur by a C.I.A. official working under Gottlieb's supervision, and Gottlieb was present when the drug was given.

* * * *

Dated: April, 1999

APPENDIX AB

United States Attorney
Southern District of New York

January 7, 1999

Sidney Bender, Esq.

Dear Mr. Bender:

I enclosed copies of twelve documents related to Sidney Gottlieb's travel during the 1950's which the Central Intelligence Agency recently located.

* * * *

The CIA located the enclosed documents this week .... The documents had been misfiled and thus were not found earlier.

* * * *

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/
NANCY G. MILBURN
Assistant United States
Attorney

APPENDIX AC

United States Attorney
Southern District of New York

January 14, 1999

Sidney Bender, Esq.

Dear Mr. Bender:

I enclose a document entitled "Biographic Profile" which the CIA located this week. The document mentions Sidney Gottlieb's travel during the 1950s.

* * * *

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/
NANCY G. MILBURN
Assistant United States